Supreme Court, U.S.
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NO. _____

In The

Supreme Court Of The United States

October Term, 1994

TEXANS UNITED EDUCATION FUND

Petitioner,

VS.

TEXACO, INC. AND TEXACO CHEMICAL CO.,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Texas

PETITION FOR A WRIT OF CERTIORARI

VALORIE W. DAVENPORT
Texas State Bar #05419500
Attorney for Petitioner
1100 Louisiana, Suite 4450
Houston, Texas 77002
(713) 655-1500
(713) 655-0077 Facsimile

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QUESTIONS PRESENTED FOR REVIEW

1. Has the Texas Supreme Court violated the petitioner's right to procedural due process in its failure to refer the Motion to Recuse to the Governor of the State of Texas for her appointment of an independent body to determine the recusal issue?

2. Has the Texas Supreme Court violated the petitioner's right to procedural or substantive due process by failing to recuse itself under the circumstances presented?

3. Have the respondents to this case, Texaco and Texaco, Inc., violated the petitioner's rights to access to the courts and procedural due process by agreeing to seal court records affecting the public health and safety and properly and equally applying Rule 76a of the Texas Rules of Civil Procedure to persons who were not parties to the case or who were not otherwise present and able to contest the return of court records at the time such confidentiality agreements were made?

4. Has the trial court violated the Petitioner's right to substantive and procedural due process by denying it an evidentiary hearing on the questions of the identity and sealing of "court records?"

5. Has the Texas judicial system denied the petitioner's substantive and procedural due process rights by refusing to allow Texans United a hearing before a court of competent factual jurisdiction to determine contested issues presented to the court for review (prior to the Texas Supreme Court's determination of the substance of the legal issues presented)?

6. Was the Texas judicial branch decision permitting the agreed, secret removal of court records having a potentially devastating impact on the public health, safety and welfare, without public notice or hearing, a violation of Petitioner's right of free speech and/or of the press as guaranteed by the First Amendment to the United States Constitution?

7. Did the removal of records from the public domain, under a secret confidentiality agreement and without public hearing, violate the rights of the press and public to information concerning the workings of government, and deny them access to public property without due process of law?

PARTIES TO THE PROCEEDINGS

The names of all of the parties to the proceedings are as follows:

Petitioner:

TEXANS UNITED EDUCATION FUND

Attorney for Petitioner:

VALORIE W. DAVENPORT
1100 Louisiana, Suite 4450
Houston, Texas 77002

Respondents:

TEXACO, INC. and TEXACO CHEMICAL CO.

Attorneys for Respondents:

J. Mart Mitchell
Senior Attorney
Texaco, Inc.
1111 Bagby, 27th Floor
Houston, Texas 77002

Glen E. Clover
GLEN E. CLOVER, P.C.
One Sugar Creek Center Boulevard, Suite 345
Sugar Land, Texas 77478

Ms. Phyllis G. Schrader
Weycer, Kaplan, Pulaski & Zuber
1400 Summit Tower
Eleven Greenway Plaza
Houston, Texas 77046

Other Interested Parties:

JOHN R. SEXTON

Attorney for John R. Sexton:

Ms. Joan M. Lucci Bain
P.O. Box 79467
Three Riverway, Suite 950
Houston, Texas 77279

Trial Court Judge:

The Honorable Eugene Chambers
Judge, 215th District Court
1019 Congress, 16th Floor
Houston, Texas 77002

TABLE OF CONTENTS

Page

Questions Presented for Review i

Parties to the Proceedings iii

Table of Contents v

Index to Appendices vi

Table of Authorities vii

References to the Reports/
Opinions Delivered 2

Statement of Grounds for Jurisdiction 2

Applicable Statutes Involved and
Constitutional Provisions 3

Statement of the Facts Material to
the Questions Presented 6

Reasons for Granting the Writ 13

Conclusion 19

INDEX TO APPENDICES

APPENDIX A	Order to Dismiss Texans United Education Fund's and Valorie W. Davenport's Petition in Intervention.
APPENDIX B	14th Court of Appeals' Opinion - Dismissal for Want of Jurisdiction.
APPENDIX C	Texas Supreme Court's letter denying Petitioners' Application for Writ of Error.
APPENDIX D	Texas Supreme Court's letter overruling Petitioners' Motion to Recuse.
APPENDIX E	Texas Supreme Court's letter overruling Petitioners' Motion for Rehearing and Motion for Rehearing on Motion to Recuse.
APPENDIX F	Applicable Rules & Statutes
APPENDIX G	Attachments to Writ of Error Filed with Texas Supreme Court (Entire Application incorporated by reference pg. 23)

TABLE OF AUTHORITIES

STATUTES AND CONSTITUTIONAL PROVISIONS

TEX.R.APP.P.15(c) 3

TEX.R.APP.P.15a 3

TEX.R.APP.P.18b 4

TEX. R. APP. P. 121(c) 7

TEX. R. APP. P. 133 9

TEX. R. CIV. P. 76 4

TEX. R. CIV. P. 76a 4

TEX. CONST. art. V. § 6 10

TEX. CONST. art. V. §11 5

TEX. CONST. art. V. §28 6

U.S. CONST. art. XIV 6

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Petitioner,

VS.

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Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Texans United Education Fund, respectfully prays that a writ of certiorari issue to review the opinion of the Supreme Court of Texas which allowed the removal of records from the public domain, refused to grant Petitioner's request for an evidentiary hearing and refused to refer the Motion to Recuse to an independent panel of jurists or to the Governor of the state for neutral determination as required by law, all of which constitute violations of the petitioner's rights under the First and Fourteenth Amendments to the United States Constitution.

REFERENCE TO THE REPORTS/OPINIONS DELIVERED

The original trial court case is styled *John R. Sexton, Plaintiff v. Texaco Inc., Texaco Chemical Co., L. Garbrecht, Jr. and W.B. Reals, Defendants*, cause number is 89-006630 in the 215th Judicial District Court of Harris County, Texas. The later filed Petition in Intervention is styled *Texans United Education Fund and Valorie W. Davenport, Intervenors, v. Texaco Inc. and Texaco Chemical Co., Defendants*, also filed in the 215th Judicial District Court of Harris County, Texas. The appeal, styled *Texans United Education Fund and Valorie W. Davenport, Appellants v. Texaco Inc. and Texaco Chemical Co., Appellees* was filed in the 14th Court of Appeals under cause number A14-92-01201-CV. The Writ of Error to the Texas Supreme Court is styled *Texans United Education Fund and Valorie W. Davenport, Petitioners v. Texaco, Inc. and Texaco Chemical Co., Respondents*, cause number D-4158.

STATEMENT OF GROUNDS FOR JURISDICTION

The Order to Dismiss Texans United Education Fund's and Valorie W. Davenport's Petition in Intervention was signed and filed on October 9, 1992. (Appendix A). The 14th Court of Appeals Opinion was rendered and filed on July 1, 1993. (Appendix B). The Supreme Court of Texas denied Petitioners' Application for Writ of Error on September 1, 1994. (Appendix C). The Supreme Court of Texas denied Petitioners' Motion to Recuse on October 6, 1994. (Appendix D). The Supreme Court of Texas denied Petitioners' Motion for Rehearing of Application for Writ of Error and Motion for Rehearing on Motion to Recuse on November 3, 1994. (Appendix E). This Court's jurisdiction is invoked under Title 28, U.S.C. §1254(1).

APPLICABLE STATUTES AND CONSTITUTIONAL PROVISIONS

1. TEX.R.APP.P.15. RECUSAL OR DISQUALIFICATION OF JUSTICES OF COURTS OF APPEALS, THE SUPREME COURT AND JUDGES OF THE COURT OF CRIMINAL APPEALS

(c) Prior to any further proceeding in the case, the justice or judge shall either recuse himself or certify the matter to the entire court, which will decide the motion by a majority of the justices or judges of the court sitting en banc. A justice or judge who is challenged shall not sit en banc to consider the motion. If a majority of the justices or judges are challenged, the court shall nonetheless decide the motion as to each justice or judge, one at a time, by a majority of the justices or judges sitting en banc except the particular justice or judge being considered each time shall not sit en banc to consider the motion as it directly affects that justice or judge.

2. TEX.R.APP.P.15a. GROUNDS FOR DISQUALIFICATION AND RECUSAL OF APPELLATE JUDGES

A judge of an appellate court shall disqualify or recuse himself in any proceeding in which judges must disqualify or recuse themselves under Texas Rule of Civil Procedure 18b, or in which he participated in the trial or decision of any issue in the court below.

3. **TEX.R.APP.P.18b. GROUNDS FOR DISQUALIFICATION AND RECUSAL OF JUDGES (This section is provided in full in the attached appendix)**

(1) Disqualification. Judges shall disqualify themselves in all proceedings in which:
(b) they know that, individually or as a fiduciary, they have an interest in the subject matter in controversy;
(4) In this rule:
(d) "financial interest" means ownership of a legal or equitable interest, interests, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that: (v) an interest as a taxpayer or utility ratepayer, or any similar interest, is not a "financial interest" unless the outcome of the proceeding could substantially affect the liability of the judge or a person related to him within the third degree more than other judges.

4. **TEX.R.CIV.P. 76. MAY INSPECT PAPERS**

Each attorney at law practicing in any court shall be allowed at all reasonable times to inspect the papers and records relating to any suit or other matter in which he may be interested.

5. **TEX.R.CIV.P. 76a. SEALING COURT RECORDS**

(This rule is provided in full in the attached appendix)

1. Standard for Sealing Court Records. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following:

(a) a specific, serious and substantial interest which clearly outweighs:
(1) this presumption of openness;
(2) any probable adverse effect that sealing will have upon the

general public health or safety;
(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

6. TEX. CONST. art. V, §11. DISQUALIFICATION OF JUDGES; EXCHANGE OF DISTRICTS; HOLDING COURT FOR OTHER JUDGES

Sec. 11. No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case. When the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals, or any member of either, shall be thus disqualified to hear and determine any case or cases in said court, the same shall be certified to the Governor of the State, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of such cause or causes. When a judge of the District Court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try said case; or upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law.

And the District judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law. This disqualification of judges of inferior tribunals shall be remedied and vacancies in their offices filled as may be prescribed by law.

7. TEX.CONST. art. V, §28. VACANCIES IN JUDICIAL OFFICES

Sec. 28. Vacancies In Offices Of Judges Of Superior Courts To Be Filled By The Governor.

Vacancies in the office of judges of the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals and the District Courts shall be filled by the Governor until the next succeeding General Election; and vacancies in the office of County judge and Justices of the Peace shall be filled by the Commissioners court until the next succeeding General Election.

8. U.S.CONST. art. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE FACTS WHICH ARE MATERIAL TO THE QUESTIONS PRESENTED

John R. Sexton ("Sexton") was head of corporate safety for Texaco Corporation, ("Texaco") a Respondent in this case. Shortly before his termination from a career that had lasted for over thirty (30) years, Sexton was called by Texaco's Chairman of the Board and asked to investigate certain plants and facilities owned and operated by Texaco. During the course of these hazard evaluations and/or studies, Mr. Sexton uncovered various hazards and violations of both state and federal law. He immediately reported these violations/hazards to Texaco management. Sexton also requested a follow-up investigation and correction of those problems. The company delayed and avoided further action and John Sexton, for the next year (and what was eventually the remaining period of his employment), continued to insist that Texaco fulfill its legal and moral obligations. When Sexton's complaints bacame too vocal and his insistence that Texaco take corrective action became too adamant, Texaco

terminated Mr. Sexton's employment, ostensibly due to its "change in management style."

Sexton sued Texaco for wrongful termination and a variety of claims including Texas' common law version of a "whistle-blower" cause of action. During the course of those complaints, discovery was taken through requests for production, interrogatories and depositions whereby the various hazards uncovered by Sexton were revealed and documents supporting the existence of those hazards and the validity of his concerns were requested and produced or placed under seal with the state district court.

Texaco contended that even if the allegations made by John R. Sexton were true, Texas law did not allow an employee who was fired under these circumstances to bring a wrongful termination case against his employer. In short, it was Texaco's position that, regardless of whether or not Sexton was prevented from doing that which was legally required, he was not specifically "asked to do an illegal act" and, therefore, his termination (for his threat of exposure of the violations, etc.) was not improper under Texas law.

The trial court judge denied much discovery and ultimately granted summary judgment in Texaco's favor on many of the causes of action. An expedited review of the decision denying discovery, through an application for writ of mandamus, was filed in the Texas Court of Appeals. The Texas Court of Appeals "granted leave to file the application for writ of mandamus," thereby indicating that it was of the tentative opinion that Mr. Sexton was entitled to the relief requested (thereby implying that a cause of action did exist under these circumstances). TEX. R. APP. P. 121(c). Shortly thereafter, Texaco settled its case with Mr. Sexton; however, as part of the settlement agreement, Texaco required Sexton to keep all information confidential as well as to return all records, including safety related documents and copies thereof, which he had been provided (by Texaco) as a part of formal production. Many of the documents slated to be returned were directly related to matters affecting the public health, welfare and safety. As a result, co-counsel for Sexton objected to any condition of the agreement which required the return of formal production. It was co-counsel's position that any agreement that these documents be returned was in violation of Rule 76 and 76a

of the Texas Rules of Civil Procedure. Rules 76 and 76a guarantee and provide lawyers and members of the general public continued access to court records, especially those that relate to matters affecting the public health and safety. In fact, Rule 76a prevents the sealing of such court records without a hearing, regardless of whether or not the records are formally on file with the court or district clerk (versus held by counsel as unfiled discovery). Sexton's lead counsel filed a motion to dismiss the court of appeals action (over co-counsel's objection), an act designed to eliminate the only existing vehicle by which the agreed return of safety related discovery could be challenged.

Rule 76 and Rule 76a of the Texas Rules of Civil Procedure provide and guarantee the public and press access to "court records" as a part of the procedural due process guaranteed by the United States Constitution as well as the Texas Open Courts Provision. Co-counsel requested that, as part of its ruling on Sexton's Motion to Dismiss, the Court of Appeals instruct all counsel to preserve the documents at issue. The appellate court delayed ruling for four months, after which time, it dismissed the mandamus action without comment as to either parties' need to preserve or return the safety related documents at issue. (Like a Motion for Non-suit, Sexton's Motion to Dismiss the appellate court action was mandatory, and arguably stripped the appellate court of anything but the ministerial power to dismiss).

After the dismissal, co-counsel, Valorie W. Davenport, and now Petitioners Texans United Education Fund, were forced to file a Plea in Intervention pursuant to Rule 76a of the Texas Rules of Civil Procedure, in which they sought to preserve and protect the safety related discovery. Texans United Education Fund, the newly added Petitioner for purposes of the subsequent intervention (and the only Petitioner in this case), is a non-profit public interest group concerned with environmental issues such as those raised by the Texaco investigation. That group shared co-counsel's concern over the return and possible destruction of safety related documents and joined her in the filing of a Petition in Intervention in which they requested that a hearing be held to determine the right and need to preserve the evidence at issue.

Stating that the Petition in Intervention, which was filed within thirty days of the appellate court's dismissal of the mandamus, was not timely, the trial court refused to hold an

evidentiary hearing in order to determine whether or not safety records were, in fact, being improperly returned. Although Rule 76a appears to provide for perpetual jurisdiction over discovery (document) matters, the trial court held that it lacked jurisdiction to hear the document challenge and then dismissed Petitioners' intervention for "lack of jurisdiction."

Petitioner, Texans United Education Fund, together with then Co-Intervenor, Co-Counsel Valorie W. Davenport, appealed to the Texas Court of Appeals, seeking to reverse the trial court's dismissal for want of jurisdiction and force the trial court to hold the necessary evidentiary hearing to determine the nature of documents covered by the agreements as well as to identify which documents, if any, constituted "unfiled discovery" under Rule 76a.[1] The Texas Court of Appeals held that the trial court correctly dismissed the matter and likewise dismissed the case for "want of jurisdiction." An Application for Writ of Error was filed with the Texas Supreme Court and the same remained pending for almost a year. On September 1, 1994, the Texas Supreme Court denied Petitioners' Application for Writ of Error, not because of "want of jurisdiction" (the basis held by the two lower courts) but rather on the apparent basis that the facts or issues presented were not of sufficient importance to the jurisprudence of the state to warrant Supreme Court consideration. The notation on the Court's denial of the Application for Writ of Error was "writ denied." TEX.R.APP.P. 133. In essence, the appellants, now petitioners, were denied any fact-findings by the courts of competent fact-finding jurisdiction (i.e. the trial court and the court of appeals) only to have the Texas Supreme Court assume jurisdiction, but deny them consideration because the issues, as shown through facts which Petitioner had been denied the opportunity to properly develop, lacked merit.

The petitioners had expected that the Texas Supreme Court would consider only the issue of whether or not the lower courts possessed continuing jurisdiction under Rule 76a and, if jurisdiction was found to exist, then remand the case to a court of competent (factual) jurisdiction to hear and determine the

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1 It was co-counsel's position that the return of these documents violated Rule 76a and therefore, that the Lawyer's Creed and her Code of Professional Ethics required her to contest the agreement to the extent that the agreement to return safety related discovery breached the Texas Rules of Civil Procedure or was otherwise illegal.

underlying fact issues and thereby determine whether or not an improper sealing order had occurred. By finding jurisdiction sufficient to issue a "writ denied," the Supreme Court found that jurisdiction existed, not only in Austin, but in the lower two courts. Certainly, had the lower courts been devoid of jurisdiction, there would have been no proper mechanism for the case to have reached the Supreme Court. Since jurisdiction could not have suddenly materialized only at the final stage of the appellate process, logic requires us to conclude that the Texas Supreme Court determined that jurisdiction existed at the two lower courts as well, and that those courts' rulings (finding no jurisdiction) were erroneous. Petitioner contends that, since the Texas Supreme Court was without the authority to make a factual determination, the petitioner was deprived of their right to a determination and hearing of factual issues by a court of competent jurisdiction. TEX.CONST. ART. V. § 6. These implied fact findings (by the Texas Supreme Court) caused another wrinkle to arise.

The hazardous conditions uncovered by Sexton at one of the plants at issue, specifically Texaco's Austin Lab where many of the violations allegedly occurred, potentially jeopardized the persons who lived and/or worked in a 10-mile radius of land surrounding the facility. As to the Austin Lab, this area included the building housing the Texas Supreme Court. As such, if the court were to determine fact-based issues or even review the evidence from a factual point of view, the members of the Court were each, individually, among those citizens who could be affected by the court's ruling with regard to the underlying issues of fact. Once the court assumed jurisdiction and addressed the fact-based issues, the relevant question became whether or not the present sitting members of the Texas Supreme Court (who were working and possibly living in the potentially affected area) should be the jurists who considered and resolved the questions presented.

Therefore, once the Supreme Court assumed jurisdiction (and simultaneously rendered its decision to refuse review of the merits of the underlying issues), Appellant filed a Motion to Recuse the present sitting members of the Texas Supreme Court. This motion was based on the fact that the present members clearly were among the limited segment of the public who lived and/or worked in the potentially affected area. Therefore, each and

every member of the court had a personal and direct potential interest in the subject of the litigation.[2] A request for recusal of the entire court is not unique or without Texas procedural precedent. In the case of *Johnson v. Darr*, 272 S.W. 1098 (Tex. 1925), the Texas Supreme Court was forced to recuse itself and allow the governor of the state to appoint an all female independent Supreme Court to hear the particular matter at issue.

Petitioner contends that, once a motion to recuse is filed, the law requires that the court and/or challenged jurist halt any further action until the recusal issue is determined. As a general rule, the issue of recusal is determined by neutral third parties whose bias, prejudice or potential interest in the matter at issue is not in question. The need for a neutral body or jurist to determine the issue typically necessitates a referral of the issue to an unaffected jurist or panel or court (or in this case to the governor of the state of Texas for appointment of a neutral body) to determine whether or not recusal is necessary.

However, once challenged, the Texas Supreme Court did not follow any of those alternatives. Under present Texas appellate court law, the Supreme Court apparently allowed the other sitting jurists to collectively rule on the Motion to Recuse as it pertained to each of their challenged brethren. While this may arguably be proper in situations where each of the members of the court are challenged on different grounds, in this case their commonality of interest and the unity of the basis for challenge was such that Petitioner's recusal argument applied equally to all sitting members of the Texas Supreme Court. Petitioner contends that to allow eight of the justices (who had been challenged under similar grounds) to make the determination as to whether or not the ninth remaining justice should be recused, (then have the other justices determine that same issue as it applied to the eighth justice, etc.) denied the petitioner its right to procedural and substantive due process of law. The end result was that the Texas

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2 This is not standard "public interest litigation" where all jurists in Texas would be similarly situated. In this instance there was a 10-mile radius potentially affected by the hazards present at the Austin lab. The Supreme Court Building, the working environment for each and every one of the justices then empaneled to hear the matter, was squarely within the allegedly affected area. Therefore, the propriety of that body (or of any jurist within that same 10-mile radius) to hear the issues to be presented, posed a real and legitimate concern. There are hundreds, if not thousands, of other jurists qualified within the state, who reside outside the affected area, who were available for appointment and whose neutrality and impartiality would not be subject to question.

Supreme Court, through review by its own jurists who sat individually challenged on the same basis, determined that recusal of each and/or all of the individual justices was not required. The Supreme Court then "denied" Petitioners' Motion to Recuse, "denied" the Motion for Rehearing on the Motion to Recuse and again "denied" the Petitioners' Motion for Rehearing on Petitioners' Application for Writ of Error.

Petitioner of this Honorable Court contends that several constitutional violations occurred which include the following: (1) denial of its access to the courts and to public records through the improper sealing of court records; (2) denial of Texans United Education Fund's equal right to protection under the laws, through holding that its challenge to the sealing of safety documents was untimely although it had no notice of the original action and was not a party to the case; (3) the denial of procedural and substantive due process through the failure of the Texas Supreme Court to refer Petitioners' Motion to Recuse to the Governor so that the same could be heard by an independent neutral body whose jurists were not subject to challenge on the same basis as those challenged in the matter to be decided; and (5) by denial of the motion to recuse, petitioner was denied its right to a fair and neutral body to hear and resolve relevant fact issues which were to form the substantive basis for the Intervention contesting the propriety of the confidentiality agreement and the parties' agreed return of safety related court records (without benefit of hearing). Petitioner contends that these acts and omissions were also in violation of its, the press' and the public's right to public information generated in connection with our judicial branch of government.

REASONS FOR GRANTING THE WRIT (ARGUMENTS)

1. THE FINDING OF JURISDICTION AND REFUSAL TO REMAND THE CASE FOR FACT FINDINGS AND DEVELOPMENT OF THE UNDERLYING ISSUES CONSTITUTES DENIAL OF THE PETITIONER'S RIGHT TO SUBSTANTIVE AND PROCEDURAL DUE PROCESS. (Relevant to Question 4 and 5).

Once a claim has been found to have been improperly dismissed for want of jurisdiction, a claimant should have access to the courts to address the merits of the underlying issue, prior to a determination of his claim. Contested facts should be resolved only after the movant has had the opportunity to present evidence in keeping with the rules of evidence and procedure. In this instance, Rule 76a provided for an evidentiary hearing which should have allowed the movant to present evidence so as to determine a plethora of issues, including: whether or not documents were court records, (including unfiled discovery); whether any or all returned documents which were the subject of the protective order were, in fact, otherwise on file through other motions; and/or, whether the terms and continued application of an earlier protective order amounted to the sealing of safety related discovery without the requisite showing that the need therefor outweighed the public's right and/or need for the information sought to be rendered "confidential" and therefore inaccessible.

In matters of this nature, the Texas Court of Appeals is the last court of fact finding jurisdiction. TEX. CONST. ART. V. § 6. Therefore, absent an evidentiary hearing in the trial court, "a bystanders bill," or other competent evidence presented to the court of appeals, the Texas Supreme Court was left to evaluate the statements made by Texaco and its counsel to refute the charges and claims made by the Petitioner/ Intervenor/Movant. If Petitioner's claims are true, then the issues presented suggest facts and circumstances which are highly important to Texans and to the jurisprudence of our state. Any finding that the issues were not of such import so as to require review must, by definition, have included a weighing of the "allegations," "facts" and "evidence" then before the court. In this instance, although there are indeed allegations, Petitioner was never permitted to present, for actual consideration, the facts made the basis for Petitioner's claim (and

concerns). The Texas Supreme Court, by finding jurisdiction, but refusing to hear the merits of the matter or remand the case so that the facts could be fully developed in the lower courts (which are vested with factual jurisdiction), thereby deprived the petitioner of due process of law, both on a procedural and substantive basis.

2. THE DISMISSAL OF TEXANS UNITED'S CLAIMS (INTERVENTION, ETC.) FOR WANT OF JURISDICTION, EVEN THOUGH TEXANS UNITED WAS NOT A PARTY TO THE ORIGINAL CASE, IS A VIOLATION OF TEXANS UNITED'S RIGHT OF ACCESS TO THE COURTS AND TO PROCEDURAL DUE PROCESS OF LAW." (Relevant to Question 3).

Texans United was not a party to the original wrongful termination claim brought by John R. Sexton. It was not involved in, nor did it have knowledge of, the parties ultimate agreement for the return and potential destruction of court records vis a vis the return of all Texaco documents (and all copies thereof) provided in answer to Plaintiff's Request for Production, which necessarily included certain safety related unfiled discovery. Because of the confidentiality agreement signed by John R. Sexton, he could not properly confirm or deny the nature and content of documents slated for return.

Rule 76a expressly allows an intervention challenging the return or sealing of discovery to be filed at any time, before or after judgment. Even, assuming arguendo, that counsel Davenport's claims should or could have been more timely asserted and, therefore, that she was estopped from raising the issue through a later filed Plea in Intervention, Texans United was not a party and therefore did not have the opportunity to timely challenge the trial court's action. Therefore Texans United Education Fund has been denied equal access to the courts and equal protection under the laws (by virtue of its non-party/non-agency status). The dismissal deprived Texans United of its rights of access to court records and to the courts, rights clearly conferred upon others pursuant to the provisions of the Rule and the State and Federal Constitutions. Such deprevation occurred before Texans United knew, should have known or could have known of the subject matter of the confidentiality agreement which ultimately resulted in the possible improper return of unfiled, safety related discovery.

3. IF THE TEXAS RULES OF APPELLATE PROCEDURE, RULE 15(c), ALLOW FOR THE REMAINING JUSTICES OF THE TEXAS SUPREME COURT TO HEAR AND RESOLVE AN ISSUE OF RECUSAL, THE NATURE OF WHICH WAS COMMON TO ALL SITTING MEMBERS, THE RULE ITSELF VIOLATE TEXANS UNITED'S RIGHT TO PROCEDURAL DUE PROCESS OF LAW. (Relevant to Question 1).

The Fourteenth Amendment to the United States Constitution guarantees a litigant a fair and impartial tribunal for resolution of civil and criminal matters within the judicial system. If the Texas Supreme Court is permitted to pass rules of appellate procedure which essentially allow jurists to decide the correctness or validity of a movant's recusal request, when they, themselves, stand challenged upon the same basis as the member whose ability to preside is then under question, a violation of the movant's due process rights under the Fourteenth Amendment has occurred. If this is to be allowed, the result is that the now exonerated jurist, still in a grateful state of euphoria, may reexamine those exact facts (or even rely on the court's earlier holding under the doctrine of stare decisis) and apply the same ruling to his brethren, also challenged, who just determined that his/her own recusal was not required. Where the interest being challenged is identical, all challenged jurists should be estopped from determining the merits of the recusal motion under consideration.

4. THE REFUSAL BY THE TEXAS SUPREME COURT TO REFER THE MOTION TO RECUSE (AND ANY OTHER MOTIONS RELEVANT THERETO) TO THE GOVERNOR OF THE STATE OF TEXAS SO THAT THE MATTER COULD BE ASSIGNED TO AN INDEPENDENT PANEL FOR DETERMINATION OF, AT MINIMUM, WHETHER OR NOT RECUSAL SHOULD BE REQUIRED, AMOUNTED TO AN UNCONSTITUTIONAL DENIAL OF PETITIONER'S RIGHTS TO DUE PROCESS OF LAW. (Relevant to Question 1 and 2).

Texas law clearly provides for circumstances where the entire Texas Supreme Court is rendered incapable of hearing the

matter presented or then at issue. This same law would suffice to allow the appointment of a neutral independent panel to determine whether or not the recusal motion, or any attendant motion which requires the jurists to weigh and resolve facts presented, should be granted or denied. Texans United, as a person under the law, was entitled to review of its Motion to Recuse and challenge to the sitting jurists of the Texas Supreme Court by a fair and impartial panel of jurists who had no interest in the pending litigation and/or did not live, work or breathe in the affected area. The referral of the matter to be decided by jurists, challenged under the same basis, whose need for recusal was still awaiting determination, violated the Petitioner's Fourteenth Amendment rights to due process of law.

5. TO PERMIT THE REMOVAL OF RECORDS FROM THE PUBLIC DOMAIN UNDER A SECRET CONFIDENTIALITY AGREEMENT (AND WITHOUT PUBLIC HEARING) VIOLATED THE RIGHTS OF THE PRESS AND PUBLIC TO INFORMATION CONCERNING THE WORKINGS OF GOVERNMENT, AND DENIED THEM ACCESS TO PUBLIC PROPERTY, WITHOUT DUE PROCESS OF LAW. (Relevant to Question 7).

6. TO PERMIT THE AGREED, SECRET REMOVAL OF COURT RECORDS HAVING A POTENTIALLY DEVASTATING IMPACT ON THE PUBLIC HEALTH, SAFETY AND WELFARE, WITHOUT PUBLIC NOTICE OR HEARING, INFRINGED UPON PETITIONER'S AND ALL CITIZENS OF THE STATE OF TEXAS' BASIC FUNDAMENTAL RIGHTS TO LIFE, LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW. (Relevant to Question 7).

ARGUMENTS FOR FIVE AND SIX ABOVE

Removal of safety related information (of this potential magnitude) from the public domain without notice or a hearing deprived and infringed upon, not merely Petitioner's rights, but also on the rights of all citizens of the State to life, liberty and property, without due process of law. Public information is the public's property and domain. Once information is made a part of the public domain through court filings and reliance on the judicial

branch of government, it becomes public property or otherwise confers rights on the public (and the press) which theretofore did not exist. In order to remove this information from the public domain, due process of law must be followed.

7. TO PERMIT THE AGREED, SECRET REMOVAL OF COURT RECORDS HAVING A POTENTIALLY DEVASTATING IMPACT ON THE PUBLIC HEALTH, SAFETY AND WELFARE, WITHOUT PUBLIC NOTICE OR HEARING, VIOLATED THE RIGHT OF FREE SPEECH AND OF THE PRESS AS GUARANTEED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION. (Relevant to Question 6).

Rule 76a was initially enacted and codified as a result of pressure from the public and press in its efforts to prevent concealment of, and free access to, information which could be vital to the public's health, safety and welfare. Secret agreements of this type prevent information from being provided to the press and to members of the general public and, therefore, by the nature of the abuse and violation, prevents challenge to the secrecy agreements by the most affected persons. (In this instance; however, it is what they don't know that will or may hurt them.) The press and members of the Austin populace were denied knowledge of the allegations (and certainly of their specific claims) as well as denied access to the documentation which supported the allegations made by John Sexton. Once these documents were/are returned, the files will be closed and Sexton's silence will be guaranteed (by the prior agreement). It is the public and the press, who were without the knowledge and basis to determine even the need or basis to challenge the parties' agreement, who may unnecessarily and tragically suffer.

Petitioner is aware that no agency of the press is a party to this cause; however, in order to determine the seriousness of the need for protection of such First Amendment rights, and to understand the vigor compelling Petitioner to seek review, one need only read John Sexton's affidavits as attached to the original Application for Writ of Error to the Texas Supreme Court. Those allegations, made under oath by a thirty year, highly respected member of Texaco upper management - Texaco's own head of Corporate Safety - speak far more than this petitioner could ever

say about the need to righteously and fervently protect First and Fourteenth Amendment guarantees. Petitioner offers those affidavits again now and incorporates the same as if fully set forth at length.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Texas Supreme Court in this matter.

DATED: February 1, 1995

Respectfully submitted,

VALORIE W. DAVENPORT
Attorney for Petitioner
Texas State Bar #05419500
1100 Louisiana, #4450
Houston, Texas 77002
(713) 655-1500
(713) 655-0077 FAX

APPENDIX A

89-006630

JOHN R. SEXTON, Plaintiff v. TEXACO, INC., TEXACO CHEMICAL CO., L. GARBRECHT, JR. and W. B. REALS, Defendants.	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 215TH JUDICIAL DISTRICT
TEXANS UNITED EDUCATION FUND and VALORIE W. DAVENPORT Intervenors, v. TEXACO INC. and TEXACO CHEMICAL CO., Defendants.	

ORDER TO DISMISS TEXANS UNITED EDUCATION FUND'S AND VALORIE W. DAVENPORT'S PETITION IN INTERVENTION

BE IT REMEMBERED that on this day there came on for hearing in due order the Motion to Dismiss filed herein by Defendants Texaco Inc. and Texaco Chemical Co., seeking an Order Dismissing the Motion to Vacate Sealing Agreement, Request for Evidentiary Hearing and Motion for Injunctive Relief filed herein by Intervenors Texans United Education Fund and Valorie W. Davenport. The Motion having been timely filed, the Court considered said Motion, the pleadings, the evidence, arguments of counsel, and all other matters property before it, and the Court is of the opinion and hereby finds that the Motion should be and it is hereby GRANTED.

IT IS, ACCORDINGLY, ORDERED, ADJUDGED AND DECREED that the Motion to Vacate Sealing Agreement, Request for Evidentiary Hearing and Motion for Injunctive Relief filed herein by Intervenors Texans United Education Fund and Valorie W. Davenport be, and it is hereby DISMISSED, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs incurred herein are taxed against Intervenors Texans United Education Fund and Valorie W. Davenport, jointly and severally, and let execution issue if same not be promptly paid.

SIGNED on the 9th day of October, 1992.

/s/
EUGENE CHAMBERS, JUDGE
215th Judicial District Court

APPROVED:

GLEN E. CLOVER, P.C.
A Professional Corporation

By: /s/_____
Glen E. Clover
SBN #04412000
Suite 865
Sugar Creek National Bank Building
One Sugar Creek Center Boulevard
Sugar Land, Texas 77478
(713) 491-1275

ATTORNEY FOR DEFENDANTS
TEXACO INC. AND TEXACO
CHEMICAL CO.

APPENDIX B

Dismissed and Opinion filed July 1, 1993.

In the

Fourteenth Court of Appeals

NO. A14-92-01201-CV

TEXANS UNITED EDUCATION FUND
AND VALORIE W. DAVENPORT, Appellants

V.

TEXACO INC. AND TEXACO CHEMICAL CO.,
Appellees

==========

On Appeal from the 215th District Court
Harris County, Texas
Trial Court Cause No. 89-06630

==========

OPINION

Appellants, Valorie Davenport and Texans United Education Fund, appeal the trial court's dismissal of their plea in intervention, for want of jurisdiction. In the intervention, appellants asserted a right to contest the propriety and enforceability of a certain non-disclosure order signed by the court in the original action. The trial court considered and rejected appellant's argument that Texas Rule of Civil Procedure 76a provided continuing jurisdiction in the case, and found that no sealing order had been entered as to certain Texaco documents. By three points of error, appellants contend the trial court erred in granting Texaco's motion to dismiss appellant's plea in intervention and in failing to follow the requirements of Rule 76a. We dismiss for lack of jurisdiction.

This case was originally filed by John Sexton in 1989, against Texaco Inc. and several individuals.[1] The suit was filed after Sexton, a thirty-year employee and manager of Texaco's Corporate Safety Department was fired for allegedly reporting illegal activities in the workplace. His reports reflected activities at several Texaco facilities which had a probable adverse effect upon the health and safety of the general public. In his original petition, Sexton alleged breach of an express and implied employment contract, employment torts, age discrimination, and wrongful discharge.

In the course of discovery in the original action, Sexton requested and received voluminous documents from Texaco, including various documents relating to safety matters at some Texaco facilities (the safety documents), together with Sexton's correspondence to and from Texaco's counsel. Sexton filed most of these safety documents as exhibits to various pleadings in the origianl action. Texaco filed a motion for protective order in regard to twenty-one documents and submitted those documents for in camera inspection, under claims that such documents were privileged. The trial court granted Texaco's motion with respect to the twenty-one documents, after finding they were privileged and not subject to production.

In a petition for writ of mandamus filed with the First Court of Appeals, Sexton appealed the granting of the protective order relating to the twenty-one safety documents, as well as an April 1991 protective order limiting plaintiff's discovery to the two-year period prior to Sexton's discharge. Prior to any ruling from the First Court of appeals, the parties reached a settlement of the original action through court-ordered mediation. The settlement agreement provided, among other things, for Sexton's return of documents produced to him by Texaco in discovery. Pursuant to the settlement agreement, the original action was dismissed on joint motion, on February 18, 1992. Sexton also filed a motion to dismiss the petition for writ of mandamus before

---

[1] Sexton, an appellee in the present action, was originally represented by the Joan Luccie Bain of the law firm of Nelkin & Nelkin. Appellant, Valorie Davenport was subsequently retained as co-counsel. The parties are now in opposition due to differences of opinion regarding certain trial court orders executed during the discovery process of the original action.

the First Court of Appeals. However, appellant, Davenport, was in disagreement with lead counsel over the settlement agreement and the subsequent court order. As a result, Davenport filed a supplemental motion to dismiss the mandamus wherein she requested that, as a condition of dismissal, the court of appeals require Texaco to maintain the protected documents as required by Texas Rule of Civil Procedure 76a (vernon Supp.1993). The First Court of Appeals subsequently withdrew leave to file the petition for mandamus without granting the relief sought under 76a.

On August 6, 1992, more than thirty days after the trial court's dismissal of the original action, Davenport and Texans United, filed their petition in intervention. The intervenors argued that the trial court still had jurisdiction under the provisions of Rule 76a which provides for continuing jurisdiction in matters where the trial court has granted a sealing order under the provision of that rule. Texaco responded, arguing that Rule 76a was not applicable because no sealing order was ever entered in this case and moved to dismiss for want of jurisdiction. The trial court dismissed intervenors' motions, finding that no sealing order had been requested or entered, and that it did not have jurisdiction to hear the motions. It is from this dismissal that the instant appeal comes.

In their second and third points of error, appellants contend the trial court erred in not following the procedural and substantive requirements of Rule 76a. Appellants argue that the April 1991 protective order and the order dismissing their plea in intervention acted as sealing orders, and as such, the requirements of Rule 76a must be followed.

In 1990, the Supreme Court of Texas promulgated Texas Rule of Civil Procedure 76a, which provides guidelines and procedures for sealing court records. TEX.R.CIV.P. 76a (Vernon Supp.1993). Included within the guidelines of the rule are the requirements of notice, public hearing and proper written motion. The purpose of the rule is to prevent an interested nonparty from waiting on the sidelines until a court issues an order, and then intervene, forcing relitigation of the issues, if not satisfied with the outcome. *Public Citizens v. Insurance Services Office Inc.*, 824 S.W.2d 811 (Tex.App.--Austin 1992, no writ).

Rule 166b.5 of the Texas Rules of Civil Procedure authorizes the trial court to enter a protective order. TEX.R.CIV.P. 166.5 (Vernon Supp.1993). The trial court's authority under this rule extends to "ordering that for good cause shown results of discovery be sealed or otherwise adequately protected, that its distribution be limited, or that its disclosure be restricted." TEX.R.CIV.P. 166b.5(c). Any order under this subsection that involves "court records" must comply with Rule 76a. TEX.R.CIV.P. 166.5(c). thus, when a trial court receives a motion for protective order under Rule 166b.5, the rule clearly provides that Rule 76a is not implicated unless documents sought to be protected include "court records" as defined in Rule 76a. *Ford Motor Co. v. Benson*, 846 S.W.2d 487, 491 (Tex.App.--Houston [14th Dist.] 1993, no writ). The non-movant in a rule 166b.5 proceeding has the burden of showing the court that there must first be compliance with Rule 76a by establishing that some or all of the documents are "court records." *Id.*

Paragraph 2 of Rule 76a provides a definition of those documents constituting "court records." Subsection (a) of paragraph 2 expressly excludes from the definition of "court records," those "documents filed with a court *in camera*, solely for the purpose of obtaining a ruling on the discoverability of such documents." TEX.R.CIV.P. 76a___.

In its dismissal of intervenors' plea in intervention, the trial court found that no sealing order had been requested or entered in this case. After reviewing the entire record, there is no evidence that anything more than a protective order was executed by the trial court concerning the twenty-one safety documents. There is no evidence of a showing by appellants to the trial court that the twenty-one documents constituted "court records." We hold Rule 76a was not implicated under the present facts because the documents in question were submitted to the court for in camera inspection and were therefore expressly excluded from the purview of the Rule. Appellant's second and third point of error are overruled.

In their first point of error, intervenors contend the trial court erred in finding it lacked jurisdiction to hear their plea in intervention and other related motions. Their argument is premised on the applicability of 76a, specifically, paragraph 7, which provides for continuing jurisdiction in the court that issues

the sealing order. Because of our holding in points of error two and three, that Rule 76a was not implicated in the present case, the continuing jurisdiction paragraph contained within that rule is likewise inapplicable.

The trial court entered its order dismissing the original action on February 18, 1992, on joint motion of the parties. No motion for new trial or appeal was filed in regard to the trial court's dismissal order entered on that date. A trial court loses its plenary power to modify, vacate, set aside or amend its judgment thirty days after the signing of the judgment. *First Alief Bank v. White*, 682 S.W.2d 251, 252 (Tex.1984); TEX.R.CIV.P. 329b(d) and (f). The trial court in the instant case lost its plenary jurisdiction to modify or amend its judgment on March 20, 1992. Furthermore, a plea in intervention comes too late if filed after judgment and may not be considered unless and until the judgment has been set aside. *Id.; Comal County Rural High School District No. 705 v.* ____ 158 Tex. 564, 314 S.W.2d 956 (1958). Intervenors' plea in intervention was filed on August 6, 1992, well after the thirty day extension of plenary power allowed under Rule 329b. We hold therefore, that the order of dismissal signed on February 18, 1992, is final and appellants' plea in intervention was untimely. Appellant's first point of error is overruled.

Accordingly, we dismiss for want of jurisdiction.

/s/ Norman R. Lee
Justice

Judgment rendered and Opinion filed July 1, 1993.

Panel consists of Chief Justice J. Curtiss Brown, and Justices Ellis and Lee.

Publish - TEX.R.APP.P. 90.

APPENDIX C

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

September 1, 1994

Ms. Valorie W. Davenport
Law Ofcs of Valorie W. Davenport
1100 Louisiana, Suite 4450
Houston, TX 77002

Ms. Laura A. Sapsowitz
Law Ofcs of Valorie W. Davenport
1100 Louisiana, Suite 4450
Houston, TX 77002

Ms. Joan Marie Lucci Bain
Joan M. Lucci Bain
P.O. Box 79467
Three Riverway, Suite 950
Houston, TX 77279

Mr. Glen E. Clover
Law Office of Glen E. Clover
One Sugar Creek Center Blvd.
Suite 345
Sugar Land, TX 77478

Mr. Joseph Mart Mitchell
Texaco, Inc.
P.O. Box 4596
Houston, TX 77210-4596

Ms. Phyllis G. Schrader
Weycer Kaplan Pulaski & Zuber
1400 Summit Tower
Eleven Greenway Plaza
Houston, TX 77046-1198

RE: Case No. D-4158
Style: TEXANS UNITED EDUCATION FUND and VALORIE W. DAVENPORT V. TEXACO, INC., TEXACO CHEMICAL CO., and JOHN R. SEXTON

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation "Writ Denied". Petitioner's motion to expedite is dismissed as moot.

Sincerely,
John T. Adams, Clerk

by: /s/
Blanca Morin, Deputy

APPENDIX D

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

October 6, 1994

Ms. Valorie W. Davenport
Law Ofcs of Valorie W. Davenport
1100 Louisiana, Suite 4450
Houston, TX 77002

Ms. Laura A. Sapsowitz
Law Ofcs of Valorie W. Davenport
1100 Louisiana, Suite 4450
Houston, TX 77002

Ms. Joan Marie Lucci Bain
Joan M. Lucci Bain
P.O. Box 79467
Three Riverway, Suite 950
Houston, TX 77279

Mr. Glen E. Clover
Law Office of Glen E. Clover
One Sugar Creek Center Blvd.
Suite 345
Sugar Land, TX 77478

Mr. Joseph Mart Mitchell
Texaco, Inc.
P.O. Box 4596
Houston, TX 77210-4596

Ms. Phyllis G. Schrader
Weycer Kaplan Pulaski & Zuber
1400 Summit Tower
Eleven Greenway Plaza
Houston, TX 77046-1198

RE: Case No. D-4158
Style: TEXANS UNITED EDUCATION FUND and VALORIE W. DAVENPORT V. TEXACO, INC., TEXACO CHEMICAL CO., and JOHN R. SEXTON

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioners' motion to recuse, as supplemented, in the above referenced case pursuant to the provisions of Rule 15(c), Texas Rules of Appellate Procedure. Petitioners' motion to supplement the motion to recuse was granted.

Respectfully yours,
JOHN T. ADAMS, CLERK

/s/

Peggy Littlefield,
Chief Deputy Clerk

APPENDIX E

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

November 3, 1994

The Honorable Dan Morales
Attorney General of Texas
P.O. Box 12548 Capitol Station
Austin, TX 78711-2548

Ms. Valorie W. Davenport
Law Ofcs of Valorie W. Davenport
1100 Louisiana, Suite 4450
Houston, TX 77002

Ms. Laura A. Sapsowitz
Law Ofcs of Valorie W. Davenport
1100 Louisiana, Suite 4450
Houston, TX 77002

Ms. Joan Marie Lucci Bain
Joan M. Lucci Bain
P.O. Box 79467
Three Riverway, Suite 950
Houston, TX 77279

Mr. Glen E. Clover
Law Office of Glen E. Clover
One Sugar Creek Center Blvd.
Suite 345
Sugar Land, TX 77478

Mr. Joseph Mart Mitchell
Texaco, Inc.
P.O. Box 4596
Houston, TX 77210-4596

Ms. Phyllis G. Schrader
Weycer Kaplan Pulaski & Zuber
1400 Summit Tower
Eleven Greenway Plaza
Houston, TX 77046-1198

RE: Case No. D-4158
Style: TEXANS UNITED EDUCATION FUND and VALORIE W. DAVENPORT V. TEXACO, INC., TEXACO CHEMICAL CO., and JOHN R. SEXTON

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioners' motion for rehearing of the application for writ of error in the above styled case. Petitioners' motion for rehearing of motion to recuse was also overruled.

Respectfully yours,

JOHN T. ADAMS, CLERK

/s/
Peggy Littlefield,
Chief Deputy Clerk

cc: Governor Ann Richards

APPENDIX F

TEXAS RULES OF CIVIL PROCEDURE
GENERAL RULES
TRCP 18b

TRCP 18b. GROUNDS FOR DISQUALIFICATION AND RECUSAL OF JUDGES

(1) **Disqualification**. Judges shall disqualify themselves in all proceedings in which:

(a) they have served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter; or

(b) they know that, individually or as a fiduciary, they have an interest in the subject matter in controversy; or

(c) either of the parties may be related to them by affinity or consanguinity within the third degree.

(2) **Recusal**. A judge shall recuse himself in any proceeding in which:

(a) his impartiality might reasonably be questioned;

(b) he has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(c) he or a lawyer with whom he previously practices law has been a material witness concerning it;

(d) he participated as counsel, adviser or material witness in the matter in controversy, or expressed an opinion concerning the merits of it, while acting as an attorney in government service;

(e) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(f) he or his spouse, or a person within the third degree of

relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iii) is to the judge's knowledge likely to be a material witness in the proceeding.

(g) he or his spouse, or a person within the first degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.

(3) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(4) In this rule:

(a) "proceeding" includes pretrial, trial, or other stages of litigation;

(b) the degree of relationship is calculated according to the civil law system;

(c) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(d) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that hold securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a

"financial interest" in securities held by the organization;

(iii) the propriety interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(v) an interest as a taxpayer or utility ratepayer, or any similar interest, is not a "financial interest" unless the outcome of the proceeding could substantially affect the liability of the judge or a person related to him within the third degree more than other judges.

(5) The parties to a proceeding may waive any ground for recusal after it is fully disclosed on the record.

(6) If a judge does not discover that he is recused under subparagraphs (2)(e) or (2)(f)(iii) until after he has devoted substantial time to the matter, he is not required to recuse himself if he or the person related to him divests himself of the interest that would otherwise require recusal.

J-IV Invest v. David Lynn Machine, Inc., 784 S.W.2d 106, 107 (Tex.App.--Dallas 1990, no writ). "Texas courts have repeatedly rejected the argument that campaign contributions might create a bias to prompt recusal."

See also Tex.Const.art. 5, §11; Tex.Rev.Civ.Stat. 5996h; Gov't Code §§21.005; 74.059(c)(3); TRAP 15, 15a; Commentaries, "Motion to Recuse," p.583; FORMS 7C.

Added by order of July 15, 1987, eff. Jan. 1, 1988. Amended by order of April 24, 1990, eff. Sept. 1, 1990.

Change by amendment effective Sept. 1, 1990; Rule entirely rewritten.

Comment to 1990 change: The grounds for a judge's mandatory recusal have been expanded from those in prior TRCP 18b(2).

TEXAS RULES OF CIVIL PROCEDURE
PLEADING
TRCP 76a

TRCP 76a. SEALING COURT RECORDS

1. **Standard for Sealing Court Records**. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed upon a showing of all of the following:

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon the general public health or safety;

(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

2. **Court Records**. For purposes of this rule, court records means:

(a) all documents of any nature filed in connection with any matter before any civil court, except:

(1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;

(2) documents in court files to which access is otherwise restricted by law;

(3) documents filed in an action originally arising under the Family Code.

(b) settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable

adverse effect upon the general public health or safety, or the administration of public office, or the operation of government.

(c) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.

3. **Notice.** Court records may be sealed only upon a party's written motion, which shall be open to public inspection. The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating: that a hearing will be held in open court on a motion to seal court records in the specific case; that any person may intervene and be heard concerning the sealing of court records; the specific time and place of the hearing; the style and number of the case; a brief but specific description of both the nature of the case and the records which are sought to be sealed; and the identity of the movant. Immediately after posting such notice, the movant shall file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas.

4. **Hearing.** A hearing, open to the public, on a motion to seal court records shall be held in open court as soon as practicable, but not less than fourteen days after the motions filed and notice is posted. Any party may participate in the hearing. Non-parties may intervene as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing a plea in intervention. The court may inspect records in camera when necessary. The court may determine a motion relating to sealing or unsealing court records in accordance with the procedures prescribed by Rule 120a.

5. **Temporary Sealing Order.** A temporary sealing order may issue upon motion and notice to any parties who have answered in the case pursuant to Rules 21 and 21a upon a showing of compelling need for specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant before notice can be posted and a hearing held as otherwise provided herein. The temporary order shall set the time for the hearing required by paragraph 4 and shall

direct that the movant immediately give the public notice required by paragraph 3. The court may modify or withdraw any temporary order upon motion by any party or intervenor, notice to the parties, and hearing conducted as soon as practicable. Issuance of a temporary order shall not reduce in any way the burden of proof of a party requesting sealing at the hearing required by paragraph 4.

6. **Order on Motion to Seal Court Records**. A motion relating to sealing or unsealing court record shall be decided by written order, open to the public, which shall state: the style and number of the case; the specific reasons for finding and concluding whether the showing required by paragraph 1 has been made; the specific portions of court record which are to be sealed; and the time period for which the sealed portions of the court record are to be sealed. The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

7. **Continuing jurisdiction**. Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. An order sealing or unsealing court record shall not be reconsidered on motion of any party or intervenor who had actual notice of the hearing preceding issuance of the order, without first showing changed circumstances materially affecting the order. Such circumstances need not be related to the case in which the order was issued. However, the burden of making the showing required by paragraph 1 shall always be on the party seeking to seal records.

8. **Appeal**. Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.

9. **Application**. Access to documents in court files not defined as court record by this rule remains governed by existing law.

This rule does not apply to any court record sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to:

(a) all court records filed or exchanged after the effective date;

(b) any motion to alter or vacate an order restricting access to court records, issued before the effective date.

Dallas Morning News, Inc. v. Fifth Court of Appeals, 842 S.W.2d 655, 657-58 (Tex.1992). "The press and the public have a right to be present at all proceedings in the trial of the underlying case, and to report all that they observe... [T]he issue in this case is whether the court of appeals is authorized to issue an order to protect its jurisdiction over an appeal pursuant to rule 76a of the Texas Rules of Civil Procedure. The court of appeals has such power."

Eli Lilly and Co. v. Marshall, 829 S.W.2d 157, 158 (Tex.1992). "[T]he trial court abused its discretion by refusing to conduct a hearing and render decision on the motion in compliance with Rule 76a."

Chandler v. Hyundai Motor Co., 829 S.W.2d 774, 774 (Tex.1992). "[T]he court of appeals dismissed Chandler's interlocutory appeal under Rule 76a(8)...[W]e believe that an interlocutory appeal pursuant to Rule 76a(8) was the proper method for complaint of the trial court's action in this case."

Public Citizen v. Insurance Servs. Office, Inc., 824 S.W.2d 811, 813 (Tex.App.--Austin 1992, no writ). TRCP "76a(7) prevents an interested non-party ... from waiting on the sidelines until a court issues an order, and then, if dissatisfied with the outcome, intervening and forcing the parties and court to relitigate the issue."

Davenport v. Garcia, 834 S.W.2d 4, 24 (Tex. 1992). "Court record 'are presumed to be open to the general public' [TRCP] 76a(1) ... The sealing of records must meet the

procedural prerequisites set forth in Rule 76a."

See Commentaries, "Sealing Records," p. 618; FORMS 7J.

Source: New rule effective Sept. 1, 1990. Added by order of April 24, 1990, eff. Sept. 1, 1990. Comment to 1990 change: New rule to establish guidelines for sealing court records in compliance with Government Code §22.010.

RULE 121c. MANDAMUS, PROHIBITION AND INJUNCTION IN CIVIL CASES

(c) **Action on Motion**. The court may request that respondent or the real party in interest submit a reply, and in that event, the clerk will so notify all identified parties. When it appears that relator may be unduly prejudiced by delay, or the court concludes requested, it may act upon the motion without giving prior notice to the respondent. If the court is of the tentative opinion that relator is entitled to the relief sought, the motion for leave to file will be granted, the petition filed, and the cause placed upon the docket. Otherwise, the motion will be overruled.

RULE 133. ORDERS ON APPLICATIONS FOR WRIT OF ERROR

(a) **Notation on Denial of Appliction**. In all cases where the judgment of the court of appeals is correct and where the principles of law declared int he opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation "Refused." In all cases where the Supreme Court is not satisfied that the opinion of the court of appeals in all respects has correctly declared the law, but is of the opinion that the application prsents no error which requires reversal, or which is of such importance to the jurisprudence of the State as to require correction, the Court will deny the application with the notation "Writ Denied." In all cases where the Supreme Court is without jurisdiction of the case as presented in the application, it will dismiss the application with the docket notation "Dismissed for Want of Jurisdiction." The Court may accompany the denial of an application with such explanatory remarks as it may consider appropriate.

(b) **Moot Cases**. If a cause or an appealable portion thereof is moot, the Supreme Court may, in its discretion and after notice to the parties, upon granting writ of error and without hearing argument with reference thereto, dismiss such cause or the appealable portion thereof without reference to the merits of the appeal.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986; amended by Supreme Court effective Jan. 1, 1988, and by Court of Criminal Appeals effective Jan. 1, 1989; amended by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1990.)

Notes and Comments

Comment to 1990 change: To make review discretionary where there is conflict in prior decisions and to make textual corrective changes.

APPENDIX G

No. 89-006630

JOHN R. SEXTON	§	IN THE DISTRICT
	§	COURT
	§	
VS.	§	HARRIS COUNTY,
	§	TEXAS
	§	
TEXACO, INC., TEXACO	§	
CHEMICAL CO.,	§	
L. GARBRECHT, JR. and	§	215TH JUDICIAL
W. B. REALS	§	DISTRICT

AFFIDAVIT OF JOHN R. SEXTON IN SUPPORT OF PLAINTIFF'S SECOND MOTION TO COMPEL

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared JOHN R. SEXTON, who, having been duly sworn by me, stated the following:

1. "My name is JOHN R. SEXTON. I am fifty-eight (58) years of age and am fully capable of making this affidavit. The facts contained herein are within my personal knowledge and are true and correct.

2. "I am the Plaintiff in cause number 89-006630, John R. Sexton v. Texaco, Inc., et al., In the District court of Harris County, Texas, 215th Judicial District Court. I have reviewed Defendants' Texaco, Inc., Texaco Chemical Co., L. Garbrecht, Jr., and W.B. Reals' Response to Plaintiff's Second Motion to Compel Production of Documents.

3. "I was initially employed by Texaco on November 19, 1957. I worked for Texaco from that date through November 13, 1987, when I was summarily dismissed from my position of Manager of the Safety Department. During that thirty (30) year period, I held several senior engineering and management positions. I was in charge of the Corporate Safety Department on December 1, 1978.

4. "In my capacity as head of the Safety Department, I was responsible for monitoring corporate safety activities and policies involving over thirty (30) subsidiaries, departments, and divisions of Texaco worldwide. In addition, I was responsible for implementing Texaco, Inc.'s disciplinary procedures with the safety department.

5. "I have always performed my job responsibilities in a capable, productive, and satisfactory manner. I was never advised otherwise by any of my written commendations. My competent performance is reflected by my performance appraisals. I have never been reprimanded by any Texaco supervisor or told that my performance was inadequate. I have never been accused of wrongdoing n connection with my work. The justification offered by my superior, Garbrecht, for my termination on November 13, 1987, was that my management style no longer fit in with the new "participative" style of management being implemented by Texaco.

6. "I am a licensed professional engineer certified in New York, New Jersey, and Texas. I have a bachelor's degree in civil engineering with a major in structures. also hold a master of science degree in industrial management. I am a certified safety professional, certified as such by the Board of Certified Safety Professionals of the Americas, Inc. I served as a consultant to the American Petroleum Institute ("API") Committee on Safety and Fire Protection for over ten years. I am a past member of the board of directors of the Texas Safety Association. I served on the executive committee of the National Safety Council, Petroleum Section, for eight years. I have served as a member of the National Safety Council's Safety Committee for ten years. I am a past member of the Organizational Resources Counselors. I have participated on numerous API task forces dealing with environmental and safety issues. In recent years, I have served as a consultant to API dealing with environmental and safety issues.

7. "While I served in the capacity of Manager of Texaco's Corporate Safety Department, in early 1985 the Safety Department began conducting safety reviews called "Hazard Assessments" at the four Texaco Chemical Company facilities. These are Austin Research Laboratory, the Port Arthur Chemical Plant, the Port Neches Chemical Plant, and the Conroe Chemical

Plant. As a result of these hazard assessments, which were performed by a team of members from the corporate safety department and from the plant being reviewed, Potential Accident Liability Evaluation ("PALE") reports, were prepared outlining the findings and recommendations of the Hazard Assessment Teams.

8. "I have been with Texaco for thirty (30) years, and had been manager of Texaco's Safety Department since 1978. During that time, I became familiar with Texaco's internal policies on how to write in-house safety reports so that on their face they will not reveal problem conditions in inflammatory language, yet provide sufficient information for the operating departments to take the corrective action that is recommended. Attached hereto as Exhibit A and incorporated herein by reference is a true and correct copy of a memorandum I received from corporate counsel with instructions regarding Texaco's official policy regarding preparation and distribution of the hazard assessment or "PALE" reports. As the policy reflects, only when hazard assessments and safety and los control reports reflect a "potential for catastrophic occurrences," are they forwarded to the legal department for review. The legal department reviews the reports for any problematic language which could be used against the company as showing corporate knowledge of existing violations. Furthermore, the reports systematically recited language to the effect that "no safety or operational deficiencies exist which pose an immediate threat to plant personnel or the community which warrant immediate action or termination of operations." This language is placed in all reports, regardless of the severity of the conditions that exist, in order to obtain legal approval to distribute the report to the various operating departments for corrective action to be taken. This phrase, or words to that effect, are inserted in every report of a Texaco safety review which identifies areas which could be catastrophic. Once the reports were reviewed and approved by corporate counsel, and in some instances outside counsel, they were returned to me for circulation to the operating departments to which they pertain. The actual reports which were distributed to the operating departments are not handled as "privileged and confidential," and did not reflect communications between counsel and members of the operating department for the purpose of facilitating the rendition of legal services. To the contrary, these PALE reports operated as guidelines to the operating departments for the corrective action recommended in the reports.

9. "The terminology "PALE" report is a term used to refer to the reports prepared to indicate the findings of safety review committees during the conduct of the hazard assessment reviews. There are PALE reports referring to each of the four chemical company facilities from early 1985. Each of those reports are forwarded to corporate counsel for review because each of those reports contained findings revealing a potential for catastrophic occurrences. In many instances, the reports contained information which reflected violations of existing safety or environmental regulations which carried civil and criminal penalties. The reports did not contain specific references to these statutes. Such references were intentionally left out. Thus, in order to interpret the report, one must be familiar with safety laws and apply them to the underlying findings. Even these are sometimes deleted from the final document or understated. Each of these reports were returned from the legal department and were distributed to the respective operating facility to which it pertained.

10. "For example, in May 1987, while I served in the capacity of manager of Texaco's corporate safety department, I learned that a Texaco Chemical Company facility, known as the Austin Research Laboratory, had existing conditions which violated the Texas Hazard Communication Act provisions regarding training programs for plant operators, plant safety rules, lack of personal protection equipment, and testing of that equipment. Further deficiencies were found in that the facility did not have standardized operational procedures on process function or chemical handling duties including testing and documentation. There was no procedure in place to determine whether trainees were qualified for plant operation, thereby subjecting trainees to substantial risk of personal injury. The plant also lacked any periodic refresher course for permanent or contract employees to insure that such employees were aware of the dangers and were qualified to work with the chemicals that were maintained there. Even worse, the Austin research laboratory stored and worked with chemicals that are so volatile that an accidental release would cause death and/or serious injury to all persons within a 10-mile radius of the plant; yet, the plant failed to establish emergency response procedures. I learned of these violations through a quantitative hazard evaluation or risk analysis that was performed by a joint committee which was composed of members of the corporate safety department, members of the chemical company

safety personnel and an outside consultant. The risk analysis was conducted as a follow up to a hazard assessment conducted by corporate safety which revealed the need to investigate further. The evaluation was performed at my request after I had spent approximately six months attempting to get approval from a Texaco Chemical Company to proceed. I received the Phase I report in May 1987.

11. "In addition to the violation of the Texas Hazard Communication Act, the Austin Texaco Chemical facility was in violation of a City of Austin ordinance, Ordinance No. 84-122000; which was enacted on December 20, 1984. Specifically, the Austin Research Laboratory violated that ordinance by not providing a materials management plan, including a contingency plan in the event of an emergency. The May 1987 risk analysis revealed that there had been two chemical leaks at the facility which had not been reported to the city as required by ordinance.

12. "Finally, the report I received in May 1987 regarding the Texaco Chemical Company Austin Research Lab revealed violations of the Federal Water Pollution Control Act of 1972. Violations consisted of the discharge of contaminated storm water runoff from the plant into an intermittent tributary or Waller Creek, which runs parallel to and outside and the Western plant boundary. The Federal Water Pollution Control Act imposes criminal penalties on any person who willfully or negligently violates the statute. The criminal penalties include a fine of not less than $2,500 nor more than $25,000 per day violation and by imprisonment of not more than one year or by both. Because I was manager of Texaco's safety department with the responsibility of insuring that violations were promptly remedied, and because the May 1987 report gave me actual knowledge of the violation, I would have been guilty of criminal conduct had I failed to pursue remedial action and concealed the violation.

13. "The PALE reports regarding the Port Neches, Conroe, and Port Arthur plants contained information that would help me to identify the safety violations that existed at those facilities, although the statutes are not identified by name in the reports.

14. "Don McKenna, who worked under my supervision n the Texaco Safety Department, was responsible for

supervising the area coordinators for Texaco Safety Department who participated in the hazard assessments of the Texaco Chemical Co. facilities. Mr. McKenna also personally participated on some of the hazard assessment teams at Texaco chemical plants. His deposition in this case was taken September 12, 1991. He confirmed his recollection that each of the PALE reports prepared on the chemical plants contained findings of potentially hazardous or disastrous conditions and recommended that further risk analysis and corrective action be taken.

15. "I attended the deposition of Don McKenna taken in this case on September 12, 1991. Attached hereto as Exhibit B are true and correct copies of excerpted pages from the deposition.

16. "The Occupational Safety and Health Administration ("OSHA") and other state and local agencies charged with the administration of safety and environmental laws, do not have the staff, or directive, to perform periodic reviews on every operating chemical or petroleum industry facility throughout the United States. Texaco alone has over five hundred facilities and even with internal reviews, Texaco cannot review those facilities every year. During the time I served as Safety Manager of Texaco, OSHA reviewed two of Texaco's five hundred facilities in a year, at the most, and these were not detailed reviews. In some years, they did not review any. Thus, there are hundreds of facilities which have not ever been reviewed by OSHA, and at the rate OSHA was conducting its reviews during the time I served as Safety Manager, it would require over three hundred years before OSHA would have reviewed every facility."

Further Affiant sayeth not.

/S/
JOHN R. SEXTON

SUBSCRIBED AND SWORN TO before me, by John R. Sexton, on this 16th day of September, 1991.

/S/
Notary Public in and for
The State of TEXAS

[SEAL]

NO. 89-006630

JOHN R. SEXTON	§	IN THE DISTRICT
	§	COURT OF
	§	
VS.	§	HARRIS COUNTY,
	§	TEXAS
	§	
TEXACO, INC., TEXACO	§	
CHEMICAL CO.,	§	
L. GARBRECHT, JR. and	§	215TH JUDICIAL
W.B. REALS	§	DISTRICT COURT

SECOND SUPPLEMENTAL AFFIDAVIT
OF JOHN SEXTON

THE STATE OF TEXAS	§	
	§	
COUNTY OF HARRIS	§	

BEFORE ME, the undersigned authority, on this day personally appeared JOHN R. SEXTON, who, having been duly sworn by me, stated the following:

1. "My name is JOHN R. SEXTON. I am fifty-six (56) years of age and am fully competent to make this affidavit. The facts contained herein are within my personal knowledge and are true and correct.

2. "I am the Plaintiff in cause number 89-006630, John R. Sexton v. Texaco, Inc., et al., In the District Court of Harris County, Texas, 215th Judicial District Court. I have reviewed Defendants' Texaco, Inc., Texaco Chemical Co., L. Garbrecht, Jr., and W.B. Reals' Second Motion for Partial Summary Judgment in the above-referenced cause.

3. "I was initially employed by Texaco on November 19, 1957. I worked for Texaco from that date through November 13, 1987, when I was summarily dismissed from my position of manager of the Safety Department. During that thirty (30) year period, I held several senior engineering and management positions. I was in charge of the Corporate Safety Department on December 1, 1978.

4. "In my capacity as head of the Safety Department, I was responsible for monitoring corporate safety activities and policies involving over thirty (30) subsidiaries, departments, and divisions of Texaco worldwide. In addition, I was responsible for implementing Texaco, Inc.'s disciplinary procedures with the safety department.

5. "I have always performed my job responsibilities in a capable, productive, and satisfactory manner. I was never advised otherwise by any of my written commendations. My competent performance is reflected by my performance appraisals. I have never been reprimanded by any Texaco supervisor or told that my performance was inadequate. I have never been accused of wrongdoing n connection with my work. The justification offered by my superior, Garbrecht, for my termination on November 13, 1987, was that my management style no longer fit in with the new "participative" style of management being implemented by Texaco.

6. "I am a licensed professional engineer certified in New York, New Jersey, and Texas. I have a bachelor's degree in civil engineering with a major in structures. also hold a master of science degree in industrial management. I am a certified safety professional, certified as such by the Board of Certified Safety Professionals of the Americas, Inc. I served as a consultant to the American Petroleum Institute ("API") Committee on Safety and Fire Protection for over ten years. I am a past member of the board of directors of the Texas Safety Association. I served on the executive committee of the National Safety Council, Petroleum Section, for eight years. I have served as a member of the National Safety Council's Safety Committee for ten years. I am a past member of the Organizational Resources Counselors. I have participated on numerous API task forces dealing with environmental and safety issues. In recent years, I have served as a consultant to API dealing with environmental and safety issues.

7. "In may 1987, while I served in the capacity of manager of Texaco's Chemical Company facility, known as the Austin Research Laboratory, had existing conditions which violated the Texas Hazard Communication Act provisions regarding training programs for plant operators. Deficiencies were found regarding the plant's program covering plant operations, plant safety rules, lack of personal protection

equipment, and testing of that equipment. Further deficiencies were found in that the facility did not have standardized operational procedures on process function or chemical handling duties including testing and documentation. There was no procedure in place to determine whether trainees were qualified for plant operation, thereby subjecting trainees to substantial risk of personal injury. The plant also lacked any periodic refresher course for permanent or contract employees to insure that such employees were aware of the dangers and were qualified to work with the chemicals maintained there. Even worse, the Austin research laboratory stored and worked with chemicals that are so volatile that an accidental release would cause death and/or serious injury to all persons within a 10-mile radius of the plant; yet, the plant failed to establish emergency response procedures. I learned of these violations through a quantitative hazard evaluation or risk analysis that was performed by a joint committee which was composed of members of the corporate safety department, members of the facility, members of the chemical company safety personnel and an outside consultant. The risk analysis was conducted as a follow up to a hazard assessment conducted by corporate safety which revealed the need to investigate further. The evaluation was performed at my request after I had spent approximately six months attempting to get approval from a Texaco Chemical Company to proceed. I received the Phase I report in May 1987.

8. "Immediately upon learning of the violations that existed at the Austin's facility, I began to seek authorization to proceed with Phase II, which was designed to develop appropriate remedial measures. My efforts included meetings with Texaco and Texaco Chemical Company management, including vice presidents. I wrote a number of letters to the Texaco Chemical Company personnel asking for authorization to continue the study and take follow-up measures. W.B. Reals, the Chief Executive Officer of Texaco Chemical needed to give authorization for me to proceed. I was finally able to make a presentation to Mr. Reals and the Texaco Chemical Company Policy Committee on July 20, 1987. At that time, I arranged to have a presentation made by a consultant to define the parameters of Phase II and associated costs. Shortly after the meeting I was told that Phase II had been approved, but despite repeated requests, I could not get an executed contract from Texaco Chemical so that Phase II could begin. I began writing letters to Texaco Chemical Company

asking that the contract be executed and returned so that we could proceed with the second stage, and emphasizing the urgency of the situation. Shortly thereafter, on November 13, 1987, I was terminated from my position at Texaco. W.B. Reals, as Senior Vice President of Texaco, Inc., was my second in line supervisor at the time. He was also chairman of the Board of Texaco Chemical Company.

9. "In my capacity as manager of Texaco's corporate safety department, there were numerous occasions when I was exposed to hazardous chemicals in the work place. My responsibilities, included the necessity that I visit the functioning Texaco facilities across the world where hazardous chemicals during the ordinary course of performance of my duties. In addition, whenever there was an emergency such as a chemical explosion, my responsibilities required that I visit the site to determine the cause of the accident. In fact, during 1987, one of the priority projects I was engaged in involved developing emergency response procedures for various facilities, which required a substantial amount of travel to these sites. On many occasions I visited the sites personally; on others, I sent my subordinates to conduct.

10. "In addition to the violation of the Texas Hazard Communication Act, the Austin Texaco Chemical facility was in violation of a City of Austin ordinance, Ordinance No. 84-122000; which was enacted on December 20, 1984. Specifically, the Austin Research Laboratory violated that ordinance b not providing a materials management plan, including a contingency plan in the event of an emergency. The May 1987 risk analysis revealed that there had been two chemical leaks at the facility which had not been reported to the city as required by ordinance.

11. "Finally, the report I received in May 1987 regarding the Texaco Chemical Company Austin Research Lab revealed violations of the Federal Water Pollution Control Act of 1972. Violations consisted of the discharge of contaminated storm water runoff from the plant into an intermittent tributary or Waller Creek, which runs parallel to and outside and the Western plant boundary. The Federal Water Pollution Control Act imposes criminal penalties on any person who willfully or negligently violates the statute. The criminal penalties include a fine of not less than $2,500 nor more than $25,000 <u>per day</u> violation and by

imprisonment of not more than one year or by both. Because I was manager of Texaco's safety department with the responsibility of insuring that violations were promptly remedied, and because the May 1987 report gave me actual knowledge of the violation, I would have been guilty of criminal conduct had I failed to pursue remedial action and concealed the violation.

12. "I met with Mr. Reals' representatives from Texaco Chemical Co. Safety in January 1987, because I was told that Texaco Chemical had refused to proceed with Phase I of the risk analysis after the corporate safety department's hazard assessment revealed the hazardous chemicals being used at Austin, and the questionable conditions that existed there. Texaco Chemical officials indicated they had been instructed to oppose Phase I because it might uncover further violations, and once it could be proven that Texaco officials had knowledge, Texaco and those officials could be held liable for any accidental injury. I objected strenuously, and pointed out that we already had some degree of knowledge, and that failure to take action would in and of itself constitute criminal negligence under some of the applicable safety laws. After this meeting, I was told the Texaco chemical had approved Phase I. I believe I was terminated because I refused to ignore the violations that had been discovered and persisted in my requests to pursue remedial action. My refusal to ignore the situation constituted a refusal to commit an illegal act punishable by criminal penalties. Attached hereto as Exhibit A is a chronology of events leading up to my discharge which includes the major events relating to the Austin Research Laboratory.

13. "I reported all of these violations, as well as others revealed by the May 1987 report to various officials within Texaco Inc. who had authority to remedy the situation. I further reported to them the urgent need that the conditions be corrected, and that criminal penalties could result if no remedial action was taken. for several months, my verbal requests went unanswered so I began to request corrective action by sending written memoranda to appropriate officials. Within a few months, my employment at Texaco was summarily terminated. It should be pointed out that W.B. Reals, Defendant in this action, was acting as a representative of both Texaco Chemical Company and Texaco, Inc. As a senior vice president of Texaco Inc., he was my second in line supervisor. In addition, he was chairman of the board of

Texaco Chemical Company, which owned and operated the Austin Research Laboratory whose violations I was reporting. The violations not only constituted a condition which endangered the workers at the facility, they endangered the lives and well-being of residents living in the vicinity of the facility. This is true with regard to the federal water violation, as well as the plant's failure to provide proper training and protective equipment to employees who were handling one chemical, which if accidentally released, would result in immediate death or serious injury to all persons within a ten mile radius. The lack of approved procedures regarding the maintenance and storage of chemicals, as well as the lack of training of the persons handling them, created a substantial risk of accidental release endangering the populace of Austin."

Further Affiant sayeth not.

/S/

JOHN R. SEXTON

SUBSCRIBED AND SWORN TO before me, by John R. Sexton, on this 5th day of September, 1991.

/S/

Notary Public in and for
The State of TEXAS

[SEAL]

FILED
JUN 21 1995
OFFICE OF THE CLERK

(2)

No. 94-1918

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

TEXANS UNITED EDUCATION FUND,
Petitioner,
v.
TEXACO INC. and TEXACO CHEMICAL CO.,
Respondents.

Petition For a Writ of Certiorari
To the Supreme Court Of Texas

BRIEF IN OPPOSITION

GLEN E. CLOVER, P.C.
A Professional Corporation
Glen E. Clover
Counsel of Record
State Bar No. 04412000
Suite 345
One Sugar Creek Center Blvd.
Sugar Land, Texas 77478

WEYCER, KAPLAN, PULASKI &
ZUBER, P.C.
A Professional Corporation
Robert Alan York
State Bar No. 22167500
1400 Summit Tower
Eleven Greenway Plaza
Houston, Texas 77046

ATTORNEYS FOR RESPONDENTS
TEXACO INC. AND TEXACO CHEMICAL CO.

Alpha Law Brief Company • Houston, Texas • (713) 981-9000 • 1-800-981-9001

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31pp

QUESTIONS PRESENTED

1. May a petitioner before the United States Supreme Court raise federal constitutional issues for the first time in its petition for writ of certiorari without having ever presented those issues to any lower court which has considered the case?

2. Under Texas Rules of Civil Procedure, may a party file an intervention in a lawsuit after the trial court has lost plenary jurisdiction over the case?

3. Does Texas Rule of Civil Procedure 76a (concerning sealing orders) apply to documents which are privileged from production, documents which are made a part of the public court record, or documents which have never been the subject of a sealing order?

4. Do the Texas rules regarding recusal of judges require that the entire Texas Supreme Court recuse itself in a case in which the only issue presented involves the jurisdiction of a trial court to entertain a petition in intervention?

LIST OF PARTIES

The undersigned counsel of record certifies that the following listed persons were parties to the proceeding in the court whose judgment is sought to be reviewed.

1. Texans United Education Fund, Petitioner.

2. Valorie Davenport, Petitioner and Co-Counsel for original party Plaintiff, John R. Sexton.

3. Texaco Inc., Respondent.

4. Texaco Chemical Company, Respondent.

5. John R. Sexton, original party Plaintiff.

Non-wholly owned affiliates of Texaco Inc. include Canyon Reef Carriers, Inc., LOOP, Inc., Williston Basin Prospects Partnership, and PIRO Implementation, Inc. Non-wholly owned subsidiaries of Texaco Inc. include El Capitan Mutual Water Company, Four Star Oil & Gas Company, Texaco Canada Petroleum, Inc. Non-wholly owned joint ventures of Texaco Inc. include Hobson TEX-1 Mine, Lake De Smet Synfuels Project, and Pekin Energy Company. Texaco Chemical Co. was a wholly owned subsidiary of Texaco Inc. which has now been sold to Huntsman Financial Group.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

REASONS FOR DENYING THE WRIT 6

I. Petitioner has failed to preserve any federal question for review by this Court by failing to present any such issue to the courts below. 6

A. Applicable facts 6

B. Applicable law 7

C. Conclusion 8

II. Petitioner's arguments regarding the constitutional implications of Tex. R. Civ. P. 76a are moot because Petitioner failed to timely intervene in the underlying suit and because no sealing order was entered which would provide the trial court with continuing jurisdiction. 9

A. Petitioner filed its Motion in Intervention more than thirty (30) days after trial court signed its final order of dismissal. 9

B. Texas Rule of Civil Procedure 76a did not operate to extend the trial court's jurisdiction 12

1. Texas Rule of Civil Procedure 76a does not apply to documents submitted for *in camera* inspection 13

2. Texas Rule of Civil Procedure 76a does not apply to the remaining discovery documents. 15

III. The Texas Supreme Court did not violate any constitutional right of Petitioner by declining to recuse itself from consideration of this case. 18

A. Petitioner failed to timely present its Motion to Recuse. 18

B. No outside panel was required to consider Petitioner's Motion to Recuse. 20

C. The Texas Constitution does not require recusal. 21

D. Conclusion 22

CONCLUSION 23

TABLE OF AUTHORITIES

Cases **Page**

Bankers Life & Casualty Co. v. Crenshaw,
108 S.Ct. 1645 (1988) 8

Christopher v. Fuerst,
709 S.W.2d 266 (Tex. Civ. App.--Houston
[14th Dist] 1986, writ ref'd n.r.e.) 11

Comal County Rural High School District No. 705 v.
Nelson,158 Tex. 564, 314 S.W.2d 956 (1958) 12

Collins v. Smith,
142 Tex. 36, 175 S.W.2d 407 (1943) 17

First Alief Bank v. White,
682 S.W.2d 251 (Tex. 1984) 11

Hidalgo Cty. Water Improv. Dist. v. Blalock,
301 S.W.2d 593 (Tex. 1957) 21, 22

Hollon v. Rethaber,
643 S.W.2d 783 (Tex. App. --San Antonio 1982,
no writ) 16

Jackson v. Van Winkle,
660 S.W.2d 807 (Tex. 1983) 11

McCormack v. Guillot,
597 S.W.2d 345 (Tex. 1980) 11

Meyer v. Great American Indemnity Co.,
154 Tex. 408, 279 S.W.2d 575 (1955) 17

National Lloyd's Ins. Co. v. McCasland,
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Nueces Cty. Drainage & Conservation Dist. v. Bevly,
519 S.W.2d 938 (Tex. Civ. App.--Corpus Christi
1975, writ ref'd n.r.e.) 22

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619 S.W.2d 445 (Tex. Civ. App.--Corpus Christi
1981, writ ref'd n.r.e.) 11

Swinney v. Mosher,
830 S.W.2d 187 (Tex. App--Fort Worth
1992, writ denied) 16

Thursby v. Stoval,
647 S.W.2d 953 (Tex 1983) 11

STATUTES, RULES AND OTHER AUTHORITY

28 U.S.C.A. §1254(1) 1

Tex. R. App. P. 15(a) 18

Tex. R. App. P. 15(c) 20

Tex. R. Civ. P. 76a . . . . . Passim

Tex. R. Civ. P.329b 10

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Discouraging Secrecy in the Public Interest",
69 Tex. L.R. 643 (1991) 14

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McElhaney & Leatherburg, "An Overview: Proposed
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No. 94-1918

IN THE

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OCTOBER TERM, 1994

TEXANS UNITED EDUCATION FUND,
Petitioner,
v.
TEXACO INC. and TEXACO CHEMICAL CO.,
Respondents.

Petition For a Writ Of Certiorari To The Supreme Court Of Texas

BRIEF IN OPPOSITION

JURISDICTIONAL STATEMENT

Texaco Inc. and Texaco Chemical Co. ("Texaco"), Respondents, object to the attempt by Texans United Education Fund, Petitioner, to invoke this Court's jurisdiction. Petitioner cites 28 U.S.C.A. §1254(1) as its basis for this Court's jurisdiction. This jurisdictional statute applies to cases decided by United States Courts of Appeals. The instant case arises from an opinion issued by the Texas Supreme Court. As such, Petitioner has failed to properly invoke the jurisdiction of this Court.

Further, even if Petitioner had cited the appropriate jurisdictional statute regarding review of opinions issued by state courts, it still cannot show, based on the facts involved in this case, that this Court has jurisdiction over this matter. Petitioner cannot meet any of the three jurisdictional standards for review by this Court of a state court opinion. Specifically, this case does not involve any properly

preserved issues regarding:

1. the validity of a treaty or statute of the United States;

2 the validity of a statute of any state on the ground of it being repugnant to the United States Constitution; or

3. any title, right, privilege, or immunity specially set up or claimed under the United States Constitution.

Because Petitioner has failed to properly invoke this Court's jurisdiction, the Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari (the "Petition") filed by Texans United Education Fund ("Petitioner") results from the trial court's dismissal of Petitioner's Motion to Intervene for want of jurisdiction. It concerns the application of Tex. R. Civ. P. 76a to certain Texaco documents. The trial court considered and rejected Petitioner's argument that Tex. R. Civ. P. 76a, concerning sealing orders, provided continuing jurisdiction in this case, found that no sealing order had been entered, and found that there was no continuing jurisdiction for its further consideration of the case. Petitioner additionally argued that Rule 76a should apply to documents submitted for *in camera* review, although Rule 76a by its own terms does not apply to such documents. The trial court's order was considered by the state district court of appeals which also dismissed the appeal for want of jurisdiction. Petitioner then sought review by the Texas Supreme Court which denied such review.

Petitioner has filed the Petition following an unsuccessful appeal from an original action in the 215th District Court of Harris County, Texas ("Original Action"). In the Original Action, John Sexton ("Sexton"), a former Texaco employee, sued Texaco, alleging employment torts, age discrimination, and that Texaco fired him for reporting various safety violations.[1]

In the course of discovery in the Original Action, Sexton requested and received voluminous documents from Texaco, including various documents relating to safety matters at some Texaco facilities (the "Safety Documents"). Sexton filed most, if not all, of these Safety Documents as exhibits to various pleadings in the Original Action. The discovery documents filed in the trial court are a part of its official records and will, therefore, be retained by the Clerk as a part of the permanent court files, available for public inspection. Texaco never requested or obtained a sealing order pursuant to Texas Rule of Civil Procedure 76a with respect to any of these documents. Texaco did file a Motion for Protective Order in regard to twenty-one documents and submitted those documents for *in camera* inspection, under claims that such documents were privileged. The trial court granted Texaco's Motion for Protective Order with respect

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[1] It should be noted that throughout the appellate process in this case, Valerie Davenport, original co-counsel for Sexton, and current counsel for Petitioner, has been named a party to this proceeding. As noted in footnote 1 of the Petition filed with this Court, Ms. Davenport has consistently maintained the position that she had an ethical duty to contest the settlement agreement in the Original Action to the extent that it violated the Texas Rules of Civil Procedure. Despite this argument, and despite the Supreme Court Rule 12.4 which deems parties below to be parties in any proceeding before this Court, Ms. Davenport has failed to list herself as a party to the Petition. Texaco can only assume that Ms. Davenport has chosen to no longer assert her argument regarding her alleged ethical obligations.

to those twenty-one documents, after finding they were privileged and not subject to production.

Sexton sought review of this Protective Order, as well as an April 1991 Protective Order entered into by the parties in a mandamus action to the First District Court of Appeals for the State of Texas ("Mandamus Action"). The parties subsequently reached a settlement of the Original Action through mediation. The settlement agreement provided, among other things, for Sexton's return of documents produced to him by Texaco in discovery. The Original Action was dismissed by the trial court on joint motion of Texaco and Sexton, by order entered February 18, 1992. In spite of actions by Petitioner's counsel (then Sexton's co-counsel) to stop such dismissal, the First Court of Appeals dismissed the Mandamus Action on July 7, 1992, without granting the Rule 76a relief sought by such counsel.

More than thirty days after dismissal of the Original Action, Petitioner filed its Petition in Intervention and other pleadings in the Original Action. Petitioner argued that the trial court still had jurisdiction under the provisions of Rule 76a of the Texas Rules of Civil Procedure which provides for continuing trial court jurisdiction in matters where the court has granted a sealing order under the provisions of Rule 76a. The trial court fully considered the possible application of Rule 76a and rejected it, dismissing Petitioner's Motions, finding (1) that no sealing order had been requested or entered and (2) that it did not have jurisdiction to hear the Motions. The trial court then dismissed Petitioner's Petition in Intervention.

Petitioner appealed the trial court's order of dismissal to the Fourteenth District Court of Appeals for the State of Texas. The Court of Appeals affirmed the trial court's finding that there was no continuing jurisdiction under Rule

76a in this case, and that the Petition in Intervention had been filed outside of the trial court's jurisdictional time limits. Based on these findings, the Court of Appeals dismissed Petitioner's appeal for want of jurisdiction.

Petitioner next sought review of the opinion of the Court of Appeals before the Texas Supreme Court. Petitioner's Application for Writ of Error was filed with the Texas Supreme Court on September 30, 1993. On September 1, 1994, the Texas Supreme Court issued an order denying the writ of error requested by Petitioner. On September 14, 1994, after the Texas Supreme Court's ruling, and a full year after originally filing its application, Petitioner filed a motion asking that the entire Texas Supreme Court recuse itself from the consideration of this case. This motion was denied. Petitioner filed motions for rehearing regarding both the Application for Writ of Error and the Motion for Recusal. After due consideration, the Texas Supreme Court denied both motions for rehearing. Following such denial, Petitioner filed the instant Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

Petitioner has failed to present this Court with any justifiable basis for granting its Petition for Writ of Certiorari. Petitioner failed to preserve any federal constitutional question for review by this Court by failing to present any such issue to the Courts below. Further, Petitioner's arguments regarding the constitutional implications of Texas Rule of Civil Procedure 76(a) are moot. Finally, Petitioner cannot establish that the Texas Supreme Court violated any constitutional right of Petitioner by declining to recuse itself from consideration of this case.

REASONS FOR DENYING THE WRIT

I. Petitioner has failed to preserve any federal question for review by this Court by failing to present any such issue to the courts below.

A. Applicable facts

Each of the questions presented by Petitioner in its Petition has federal constitutional implications. Petitioner alleges as its basis for the issuance of a writ of certiorari violations of the due process, access to the courts, and free speech/free press clauses of the federal constitution. Petitioner, however, is precluded from raising these issues because they were never presented to the courts below which have considered this case.

Petitioner raised no federal constitutional questions before either the trial court or the state district court of appeals. Likewise, Petitioner raised no federal constitutional question in its original Application for Writ of Error to the Texas Supreme Court. It was not until Petitioner filed its Motion to Recuse the Texas Supreme Court and its Motion for Rehearing of the Application For Writ of Error that any reference was made to the federal constitution. These references, however, are insufficient to preserve review of what Petitioner now alleges are violations of its constitutional rights.

In its Motion to Recuse, Petitioner made the following statement:

> Although the remedy or method of effectuating relief may not be as clearly defined when the challenge is made to all sitting jurists on the state's highest court, the

> right to a hearing by a neutral magistrate, at least as to the merits of a motion to recuse, must be preserved. Therefore, based on the guarantees of due process under the state and federal constitutions . . . Petitioners . . . respectfully request the voluntary recusal of those affected justices. . . .

Likewise, in its Motion for Rehearing of the Application for Writ of Error, Petitioner stated:

> It is inconceivable that any court would rely upon the testimony of one interested witness and find it sufficient to satisfy the requirement of a public hearing justifying the restriction of citizens' statutory rights under Rules 76 and 76a and the public and press' rights under the First Amendment to the United States Constitution.

These are the only references to the federal constitution contained in any pleading presented to any court which has previously considered this case.

B. Applicable law

Supreme Court Rule 14(h) states:

> If review of a judgment of a state court is sought, the statement of the case shall also specify the stage of the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and

> such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

Rules of the Supreme Court of the United States 14(h).

Further, this Court has ruled that vague references to constitutional provisions contained in post-decision motions are insufficient to preserve constitutional questions for review by writ of certiorari. In *Bankers Life & Casualty Co. v. Crenshaw,* 108 S.Ct. 1645 (1988), this Court considered a case in which the petitioner made vague references to violations of "due process, equal protection, and other constitutional standards" in its motion for rehearing before the Mississippi Supreme Court. *Id.* at 1649. This Court held that such vague references failed to preserve petitioner's constitutional challenges. *Id.* at 1650.

C. Conclusion

Petitioner has failed to preserve any of the complaints upon which it bases its request for a writ of certiorari. No due process claims were presented to any lower court with reference to the matters made the subject of the Application for Writ of Error to the Texas Supreme Court. The only constitutional claim regarding the Application was a vague reference to the First Amendment to the United States Constitution, contained in Petitioner's Motion for Rehearing. This reference was not specific enough to preserve any

constitutional claim. Likewise, regarding Petitioner's Motion to Recuse the entire Texas Supreme Court, only a vague reference to due process claims was made. As this Court has previously held, such vague references do not preserve any federal question for review by writ of certiorari. Therefore, absent any federal question being preserved for review by this Court, the Petition for Writ of Certiorari should be denied.

II. Petitioner's arguments regarding the constitutional implications of Tex. R. Civ. P. 76a are moot because Petitioner failed to timely intervene in the underlying suit and because no sealing order was entered which would provide the trial court with continuing jurisdiction.

Petitioner failed to file its Motion in Intervention within the trial court's jurisdictional time limit. As such, the courts which have previously reviewed this case have been correct in denying Petitioner any relief.

A. Petitioner filed its Motion in Intervention more than thirty (30) days after the trial court signed its final order of dismissal.

On February 18, 1992, the trial court judge signed a final order of dismissal in the Original Action, which provided:

> BEFORE THE COURT is the joint Motion of Plaintiff JOHN R. SEXTON, and Defendants, TEXACO INC., TEXACO CHEMICAL COMPANY, L. GARBRECHT, JR., and W. B. REALS, to dismiss with prejudice the above-entitled and numbered cause. The Court, having reviewed the motion, is of the

> opinion that Plaintiff and Defendants have released and settled all claims and matters in controversy between them.
>
> It is therefore, ORDERED that the Plaintiff's claims as set forth in Plaintiff's First Amended Original Petition are hereby DISMISSED with prejudice. It is ORDERED that the Counterclaim asserted by Defendants in their First Amended Original Answer and Counterclaim is hereby DISMISSED with prejudice. It is further ORDERED that the above entitled and numbered cause is hereby DISMISSED from the Court's docket.
>
> SIGNED this 18th day of February, 1992.

Texas Rule of Civil Procedure 329b clearly provides that, absent some special provision extending jurisdiction, a trial court loses its plenary jurisdiction over an action thirty (30) days after the order of dismissal is signed, where no motion for new trial is filed. Rule 329b provides:

> Rule 329b. Time for filing motions . . .
>
> (a) A Motion for new trial, if filed, shall be filed prior to or within thirty (30) days after the judgment or other order complained of is signed . . .
>
> . . . .
>
> (d) the trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify,

> correct, or reform the judgment within thirty (30) days after the judgment is signed.

No motion for new trial or notice of appeal was filed in this case in regard to the trial court's dismissal order entered on February 18, 1992. Therefore, on March 20, 1992, the trial court lost plenary jurisdiction to alter or amend its judgment and/or to hear further matters connected with the underlying lawsuit, including Intervenors' Motions. *See Christopher v. Fuerst,* 709 S.W.2d 266 (Tex. Civ. App.--Houston [14th Dist] 1986, writ ref'd n.r.e.) (trial court lost jurisdiction over action thirty (30) days after signing order dismissing action where no motion for new trial was filed); *Jackson v. Van Winkle,* 660 S.W.2d 807 (Tex. 1983) (trial court loses plenary jurisdiction thirty (30) days after judgment in the absence of a timely filed motion for a new trial so that any action taken after the expiration of thirty (30) days from the judgment is a nullity); *Smith v. Birdwell,* 619 S.W.2d 445 (Tex. Civ. App.--Corpus Christi 1981, writ ref'd n.r.e.) (trial court has no jurisdiction to correct judgment since thirty (30) days had passed after judgment had been entered).

In the case of *First Alief Bank v. White*, 682 S.W.2d 251 (Tex. 1984), the Texas Supreme Court considered the time during which a motion in intervention may be filed. The court held that there is no trial court jurisdiction for hearing a Plea in Intervention if it is filed more than thirty (30) days after judgment. In so holding, the court stated:

> Under the present facts, Judge White retained plenary power to vacate, set aside, modify or amend the judgment for a period of thirty (30) days after he signed it. *Thursby v. Stoval,* 647 S.W.2d 953 (Tex 1983); *McCormack v. Guillot,* 597 S.W.2d 345 (Tex. 1980); Tex.

> R.Civ. P.329(d) and (f). Judge White's plenary power over his judgment expired on June 2, 1984, and he, therefore, lacked jurisdiction to modify that judgment. Further, a plea in intervention comes too late if filed after judgment, and may not be considered unless and until the judgment has been set aside. *Comal County Rural High School District No. 705 v. Nelson,* 158 Tex. 564, 314 S.W.2d 956 (1958).

Id. at 252.

In the instant case, the trial court entered its final order of dismissal on February 18, 1992. Petitioner failed to file its petition in intervention until August 6, 1992, far more than thirty (30) days after the trial court's dismissal of the Original Action. As such, Petitioner's Motion in Intervention was filed after the trial court had already lost jurisdiction over the Original Action.

B. Texas Rule of Civil Procedure 76a did not operate to extend the trial court's jurisdiction.

Throughout its appeal of the trial court's decision, Petitioner has defined two groups of documents which it alleges are subject to the strictures of Tex. R. Civ. P. 76a. These documents include:

1. Twenty-one safety related potential accident liability evaluations, (P.A.L.E. reports), which were submitted to the 215th Judicial District Court of Harris County, Texas, for *in camera* inspection and held pending the outcome of a petition for writ of mandamus; and

2. Safety related documents and depositions which were produced to Sexton by Texaco.

Neither group of documents is subject to Tex. R. Civ. P. 76a, thus preventing any extension of the trial court's jurisdiction and preventing any violation of the federal constitution for failing to follow the guidelines set out in this rule.

1. Texas Rule of Civil Procedure 76a does not apply to documents submitted for in camera inspection.

The first group of documents to which Petitioner seeks to apply Tex. R. Civ. P. 76a are 21 safety related potential accident liability evaluations. These documents were the subject of a Motion for Protective Order filed by Texaco in the trial court. These documents were submitted to the trial court for an *in camera* inspection and were ruled to be exempt from discovery.

Rule 76a clearly does not apply to documents submitted for *in camera* review. Paragraph 2 of Rule 76a expressly excludes such documents from the application of the rule by providing:

Court records. For purposes of this rule, court records means:

a. All documents of any nature filed in connection with any matter before any civil court, except:

(1) documents filed with the court *in camera*, solely for the purpose of obtaining a ruling on the discoverability of such documents . . . .

Commentary to Rule 76a confirms that documents filed with the Court for *in camera* review are excluded from the application of this rule. *See Doggett and Mucchetti,* "Public Access to Public Courts: Discouraging Secrecy in the Public Interest", 69 TEX. L.R. 643, 662 (1991) ("the Rule does not alter existing discovery privileges").

One noted authority on Texas procedure has commented on the exclusion of documents filed for *in camera* review as follows:

> Access to documents in court files that are not defined as court records by Rule 76a remain governed by existing law. . . Rule 76a defines the term "court records" in some detail. Court records include all documents of any nature, filed in connection with any matter before any civil court, except for the following types of documents [T.R.C.P. 76a(2)(a)]:
>
> 1. Documents filed with a court *in camera* solely for the purpose of obtaining a ruling on the discoverability of the documents [see §94.02[4]].

DORSANEO, TEXAS LITIGATION GUIDE, §94.02[2] (Matthew Bender 1992). *See also* "Civil Procedure", 45 SOUTHWESTERN L.J. 85 (1991) ("the definition of court records contained in the Rule, however, expressly excludes documents filed *in camera* to obtain a discovery ruling"); McElhaney & Leatherburg, "An Overview; Proposed Rule 76a", 54 TEX. BAR J. 340 (April 1990) ("the term 'court records' does not include . . . documents filed with a court *in camera*"). Petitioner has failed to cite a single authority to

holds that Rule 76a does or should apply to documents submitted for *in camera* inspection in connection with the claim of privilege, in the face of the express language of Rule 76a(2)(a)(1) exempting such documents. As such, Rule 76a does not apply to this group of documents and the rule may not be used by Petitioner to extend the trial court's jurisdiction or as the basis for any constitutional argument based on failure to follow guidelines set out in the rule.

2. Texas Rule of Civil Procedure 76a does not apply to the remaining discovery documents.

Petitioner has alleged that the remaining discovery documents were the subject of a *de facto* sealing order either because of an April 1991 Protective Order signed by the trial court or because of the Order of Dismissal signed by the trial court. Neither of these arguments are supported by the record. Therefore, these discovery documents also cannot serve as a basis for Petitioner's constitutional arguments.

First, the Plaintiff in the underlying action, John R. Sexton's, lead counsel, Joan M. Lucci Bain, represented to the trial court in a letter dated May 8, 1992, that the documents to be returned to Texaco did not include documents which reflected conditions which may have had a probable adverse effect on the public. Additionally, Ms. Bain indicated in this letter that any documents produced by Texaco which did relate to safety inspections had been attached to pleadings made a part of the "record", and thus not sealed. *Id.* There was never any motion by any party to seal the court record in this matter.

Secondly, no complaint regarding the 1991 Protective Order was ever made by Petitioner in the trial court. It cannot be disputed that the various motions filed by

Petitioner in the trial court below failed to raise any issue of whether the 1991 Protective Order constituted a sealing order under Rule 76a. Judge Chambers was never allowed or afforded an opportunity to consider this contention. In fact, Petitioner first complained about the 1991 Protective Order as a potential violation of Rule 76a on December 11, 1992, in its response to Texaco's Motion to Dismiss Appeal, filed with the Court of Appeals for the Fourteenth Supreme Judicial District of Texas.

Petitioner has waived any right to now claim that the 1991 Protective Order constitutes a violation of Rule 76a by its failure to raise the issue at any time at the trial court level. It is well settled in Texas law that an objection to a court's ruling cannot be made for the first time on appeal. *Hollon v. Rethaber*, 643 S.W.2d 783 (Tex. App.--San Antonio 1982, no writ). In order to preserve the right of appeal, the issue must first be clearly raised, ruled on, and objected to at the trial court level. *Swinney v. Mosher*, 830 S.W.2d 187, 196-97 (Tex. App.--Fort Worth 1992, writ denied). Rule 52a of the Texas Rules of Appellate Procedure provides as follows:

> (a) General Rule. In order to preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. If the trial judge refuses to rule, an objection to the court's refusal to rule is sufficient to preserve the complaint. It is not necessary to formally except to rulings or orders of the trial court.

trial court.

In *National Lloyd's Ins. Co. v. McCasland*, 566 S.W.2d 565, 568 (Tex. 1978), the Texas Supreme Court confirmed the requirement for clearly identifying a complaint on a ruling in the trial court in order to preserve that error for appeal:

> This court has held on a number of occasions that when a motion fails to present a question in such a way that the trial court can clearly identify and understand it, the complainant is not entitled to raise the question in the court of civil appeals. *Meyer v. Great American Indemnity Co.*, 154 Tex. 408, 279 S.W.2d 575, 579 (1955); *Collins v. Smith*, 142 Tex. 36, 175 S.W.2d 407, 409 (1943).

The Texas Supreme Court, in *National Lloyd's*, went on to explain that a complainant cannot raise an entirely new basis for appeal at the appellate level:

> Further, when error is urged on one basis in the trial court, and on an entirely new and different basis in the court of civil appeals, the latter ground of complaint is not properly preserved for review. (citations omitted).

Id. at 568.

Finally, the order of dismissal signed by the trial court did not operate as a *de facto* sealing order bringing into operation Tex. R. Civ. P. 76a. As noted previously, any documents produced by Texaco which related to safety issues were attached as exhibits to pleadings filed by Sexton's counsel, Ms. Bain. At no time did the trial court grant a sealing order regarding the pleadings filed with the court in

this case. Under Rule 76a, motions for sealing orders and sealing orders themselves are distinctive, recognizable court actions with detailed procedural requirements. No effort was made to seal the record in this case. No sealing of the record occurred. As such, the documents returned as a result of the order of dismissal did not bring Tex. R. Civ. P. 76a into play or extend the trial court's jurisdiction.

As a result, the arguments presented by Petitioner regarding any alleged violations of constitutional provisions based on failure to follow guidelines set out by Tex. R. Civ. P. 76a are moot. The Petition for Writ of Certiorari should be denied.

III. The Texas Supreme Court did not violate any constitutional right of Petitioner by declining to recuse itself from consideration of this case.

Petitioner alleges that its constitutional rights were violated by the Texas Supreme Court's refusal to recuse itself from consideration of this case. Petitioner, however, failed to timely present the Texas Supreme Court with any valid or supportable reason to justify its extraordinary requested relief of recusing the entire Court. Based on this failure, the Petition for Writ of Certiorari should be denied.

A. Petitioner failed to timely present its Motion to Recuse

Texas Rules of Appellate Procedure allow a party to file a motion to recuse within thirty (30) days after the filing of a proceeding with the Texas Supreme Court. Tex. R. App. P. 15(a). The only exception to this deadline is if the party filing the motion can establish that the motion is grounded upon reasons not known within the thirty day period and that there is good cause for the late filing of the

motion. *Id.*

In the instant case, Petitioner filed its Application for Writ of Error with the Texas Supreme Court on September 15, 1993. Petitioner's Motion to Recuse was not filed until September 14, 1994, a full year after the institution of the proceeding before the Texas Supreme Court. Petitioner obviously failed to meet the deadline for the timely filing of its Motion to Recuse. In an attempt to escape this failure, Petitioner, in its Motion to Recuse and in its Motion for Rehearing, attempted to establish good cause for late filing of the Motion to Recuse by pointing to a factor belied by its own pleadings.

In its Motion for Rehearing before the Texas Supreme Court, Petitioner argued that it was unaware that the Court would be examining the merits of its case until a writ determination had been made. This allegation makes no sense, especially in light of the fact that the Application for Writ of Error filed by Petitioner with the Texas Supreme Court spent some twenty five (25) pages addressing arguments on the merits of the decisions below. It was upon these arguments as to the merits that Petitioner asked the Texas Supreme Court to grant its Application for Writ of Error.

Petitioner further argues that its failure to timely file its Motion to Recuse was somehow excused by its conclusion that the Texas Supreme Court exercised jurisdiction over this matter when the lower courts declined to do so. This is an incorrect interpretation of the Texas Supreme Court's writ disposition. As set out above, the trial court dismissed Petitioner's petition in intervention for want of jurisdiction because it was filed more than thirty days after the trial court had signed an order of dismissal in this case. The Texas Court of Appeals then dismissed Petitioner's appeal from the

trial court's order, also based on want of jurisdiction, because Petitioner failed to timely file its petition in intervention.

The Texas Supreme Court, in denying Petitioner's Application for Writ of Error did not implicitly rule that the lower courts had jurisdiction over this matter. Rather, the Texas Supreme Court merely held that while not satisfied that the court of appeals correctly stated the law in all respects, the application presented no error which required reversal, or which was of such importance to the jurisprudence of the State as to require correction. There was no jurisdictional defect in the appeal from the court of appeals to the Texas Supreme Court. Therefore, the designation of writ denied was entirely appropriate and cannot serve as the basis for a constitutional argument before this Court.

B. No outside panel was required to consider Petitioner's Motion to Recuse

Petitioner next argues that because Tex. R. App. P. 15(c) does not specifically address a situation in which a request is made that the entire Texas Supreme Court recuse itself from a matter, the Motion to Recuse should have been submitted to an independent panel for consideration. This argument is not well grounded because Tex. R. App. P. 15(c) does provide a mechanism for the determination of a motion to recuse a majority of the justices on the same court.

Tex. R. App. P. 15(c) provides:

> If a majority of the justices or judges are challenged, the court shall nonetheless decide the motion as to each justice or judge, one at a time, by a majority of the justices or judges

> sitting en banc except the particular justice or judge being considered each time shall not sit en banc to consider the motion as it directly affects that justice or judge.

This rule does not exclude situations in which the entire court has been asked to recuse itself. Rather, the rule provides an adequate mechanism for the consideration of a motion to recuse, even if that motion seeks to recuse the majority of justices on a court.

Petitioner further argues that Article V Section 11 of the Texas Constitution mandates the appointment of a special panel to consider its Motion to Recuse. This is simply untrue. This section of the Texas Constitution provides for the appointment of a special panel **after** the determination has been made that the entire Supreme Court should be recused. There is no provision for the appointment of a special panel to consider the actual motion to recuse. The Texas Supreme Court properly considered Petitioner's Motion to Recuse and properly denied same.

C. The Texas Constitution does not require recusal

Petitioner also argues that the Texas Supreme Court should have recused itself from consideration of this case because the Supreme Court building is within the alleged "danger zone" and because there are other judges in Texas who do not share this same interest. This argument ignores case law which is virtually on point with the facts of this case.

In *Hidalgo Cty. Water Improv. Dist. v. Blalock*, 301 S.W.2d 593, 596 (Tex. 1957), the Texas Supreme Court held that a trial judge who lived in the water district and purchased water from one of the parties was not disqualified

from hearing the case. In *Blalock*, the Texas Supreme Court specifically stated "[i]f his [the judge's] interest in the question is indirect, uncertain, or remote, and the result of the suit will not necessarily subject him to a personal gain or loss, he is not disqualified to sit in the case." *Id.*

Likewise, in *Nueces Cty. Drainage & Conservation Dist. v. Bevly*, 519 S.W.2d 938, 951 (Tex. Civ. App.--Corpus Christi 1975, writ ref'd n.r.e.), the Corpus Christi Court of Appeals held that the justices on the court who owned land within the drainage district and were taxpayers were not disqualified from hearing a suit involving the district. The Court specifically held that a judge is not disqualified to hear a case although he "may have a merely incidental, remote, contingent or possible pecuniary interest in the subject matter of the suit." *Id.*

In both of the above cited cases, as in this case, the judges made the subject of the motions to recuse had a higher interest in the case than other qualified jurists in the State of Texas by virtue of where they lived and worked. Nonetheless, that interest was not determined to be sufficiently direct to require recusal. Likewise, in the instant case, the interest alleged by Petitioner is at best speculative and remote. Such an interest is not the type that requires recusal from a case under the Texas Constitution.

D. Conclusion

Petitioner has failed to present this Court with any viable argument to support its position that the Texas Supreme Court's denial of its Motion to Recuse is violative of any federal constitutional standard. The procedure used in considering the Motion to Recuse, as well as the decision ultimately made, were within the guidelines set by Texas law. Petitioner cannot show any violation of the federal

constitution. Therefore, the Petition for Writ of Certiorari should be denied.

CONCLUSION

Petitioner has failed to preserve any federal question for review by this Court, thus denying this Court any jurisdictional basis for granting Petitioner's request for Writ of Certiorari. Further, Petitioner has failed to present any valid question regarding the constitutional implications of Texas Rule of Civil Procedure 76(a) because Petitioner failed to timely intervene in the underlying lawsuit and because no sealing order was ever entered which would require compliance with Texas Rule of Civil Procedure 76(a). Finally, no constitutional right of Petitioner has been implicated by the Texas Supreme Court's refusal to recuse itself from consideration of this case. Based on the foregoing, Texaco requests that this Court deny the Petition for Writ of Certiorari filed by Texans United Education Fund. Texaco also requests all other relief to which this Court may find it entitled.

Respectfully submitted,

GLEN E. CLOVER, P.C.
Counsel of Record
A Professional Corporation
State Bar No. 04412000
Suite 345
One Sugar Creek Center Blvd.
Sugar Land, Texas 77478
(713) 491-1275
(713) 491-1276 (FAX)

ROBERT ALAN YORK
WEYCER, KAPLAN, PULASKI &
ZUBER, P.C.
State Bar No. 22167500
1400 Summit Tower
Eleven Greenway Plaza
Houston, Texas 77046-1198
(713) 961-9045
(713) 961-5341 (FAX)

ATTORNEYS FOR RESPONDENTS,
TEXACO INC. AND TEXACO CHEMICAL CO.

Supreme Court, U.S.
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No. 94-1918

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

TEXANS UNITED EDUCATION FUND,
Petitioner,

v.

TEXACO INC. and TEXACO CHEMICAL CO.,
Respondents.

Petition for a Writ of Certiorari
To The Supreme Court of Texas

BRIEF IN OPPOSITION

JOAN LUCCI BAIN, P.C.
Counsel of Record
State Bar No. 01548020
P.O. Box 79467
Three Riverway, Suite 950
Houston, Texas 77279

ATTORNEY FOR RESPONDENT,
JOHN R. SEXTON

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510

QUESTIONS PRESENTED FOR REVIEW

1. Does Texas Rule of Civil Procedure Rule 76a of Texas confer a constitutionally protected right upon a third party to demand an evidentiary hearing to inspect all documents exchanged during discovery in private litigation when the trial court has lost plenary jurisdiction, and when those documents do not relate to matters affecting the health or safety of the general public?

2. Whether a settlement agreement entered into between private litigants requiring the return of documents produced by one party during discovery "unless required by law" constitutes a "sealing order" that can be used by a third party non-litigant to invoke Texas Rule of Civil Procedure 76a continuing jurisdiction provision.

3. Whether an untimely motion to recuse the entire Texas Supreme Court may be used to perfect an appeal on constitutional grounds to this Court when (a) the Petitioner was aware of the alleged interest purportedly justifying recusal from the inception of the case, and (b) the Court ruled only on issues presented in Petitioner's Application for Writ of Error.

LIST OF PARTIES

Respondent Sexton certifies that the following is a complete list of the parties, in order that members of this Court may determine disqualification or recusal:

1. Petitioners/Intervenors:

   Texans United Education Fund
   Valorie W. Davenport

2. Counsel for Petitioners:

   Ms. Valorie W. Davenport
   Law Office of Valorie W. Davenport
   1100 Louisiana, Suite 4450
   Houston, Texas 77002

3. Texaco Respondents (Defendants and Real Parties in Interest in Mandamus Proceedings):

   Texaco, Inc. and
   Texaco Chemical Co.

4. Defendants/Real Parties in Interest who have not appeared in Intervention Proceeding:

   Louis Garbrecht, Jr.
   W. B. Reals

5. Counsel for Texaco Respondents, Garbrecht and Reals: [1]

Mr. Glen E. Clover
Law Office of Glen E. Clover
Sugar Creek National Bank Building
Suite 865
Sugar Land, Texas 77478

Mr. J. Mart Mitchell
Texaco, Inc.
1111 Bagby
Suite 2600
Houston, Texas 77002

Ms. Phyllis G. Schrader
Weycer, Kaplan, Pulaski & Zuber P.C.
1400 Summit Tower
Eleven Greenway Plaza
Houston, Texas 77046-1198

6. Respondent (Original Party Plaintiff and Relator in the Mandamus Proceeding):

John R. Sexton

7. Counsel for Respondent Sexton:

Ms. Joan M. Lucci Bain *
Joan Lucci Bain, P.C.
P.O. Box 79467
Three Riverway, Suite 950
Houston, Texas 77279

* Application for Admission Pending

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[1] In its Brief in Opposition, Texaco, Inc. and Texas Chemical Company identify wholly owned affiliates, parent, and/or subsidiaries of those respondents.

8. Presiding Trial Court Judge (Respondent in Mandamus Proceeding):

The Honorable Eugene Chambers
Judge of the 215th District Court
1019 Congress, 16th Floor
Houston, Texas 77002

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS v

INDEX OF APPENDICES vi

TABLE OF AUTHORITIES vii

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

REASONS FOR DENYING THE WRIT 7

I. Because no documents or information concerning matters that have a probable adverse effect upon the general public health or safety have been sealed, Petitioner has no legally protected interest under federal or state law which entitles it to intervene in Sexton's lawsuit against Texaco 8

II. The Texas Supreme Court did not find that the trial court had jurisdiction over the intervention. To the contrary, the Texas Supreme Court's denial of Petitioner's application for Writ of Error with the notation "Writ Denied" indicates its ruling that the Fourteenth Court of Appeals properly found no jurisdiction 10

CONCLUSION. 14

INDEX TO APPENDICES

Appendix A

Excerpts from Respondent Sexton's Statement of the case to the Fourteenth Court of Appeals of Texas 1a

Appendix B

Bain Affidavit and Correspondence (Excerpts from the Record of the First Court of Appeals in Cause No. 01-92-00028-CV and the trial court) 11a

Appendix C

Correspondence from Petitioner's Counsel (Attachments to Respondent John R. Sexton's Brief in Response to Application for Writ of Error) 26a

TABLE OF AUTHORITIES

Cases **Page**

Albertype Co. v. Gust Feist Co.,
102 Tex. 219, 114 S.W. 791 (1909). 13

Dunshie v. General Motors Corp.,
822 S.W.2d 345 (Tex. App. - Beaumont
1992, no writ) 10

Ford Motor Co. v. Benson,
846 S.W.2d 487, 491 (Tex. App. -
Houston [14th Dist.] 1993, no writ). 10

STATUTES, RULES AND OTHER AUTHORITY

Tex. R. Civ. P. 76a . . . . . i, 1, 6-12, 14

Tex. R. App. P. 133. . . . . 11, 13

Tex. Gov't Code §22.001. 11

Tex. Gov't Code Ann. §22.001(a)(2), (3) and (6)
(Vernon 1988). 11

No. 94-1918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

TEXANS UNITED EDUCATION FUND,
Petitioner,

v.

TEXACO INC. and TEXACO CHEMICAL CO.,
Respondents.

Petition for a Writ of Certiorari
To The Supreme Court of Texas

BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

Respondent John R. Sexton respectfully suggests that Petitioner has improperly invoked this Court's jurisdiction. Petitioner asks this Court to review the final decision of the Supreme Court of Texas denying Petitioner's Application for Writ of Error to the Fourteenth Court of Appeals, which affirmed the trial court's decision that Texas Rule of Civil Procedure Rule 76a had not been properly invoked, and that it lacked jurisdiction over this controversy. It was not until after the Texas Supreme Court rendered its decision that Petitioner asserted that any federally protected constitutional right had been infringed. Therefore, although Respondent Sexton believes no federally protected interest has been impaired, Respondent agrees that Petitioner has failed to properly preserve any such contention for this Court's review. (See Respondent Texaco's Brief in Opposition, pp. 6-7).

STATEMENT OF THE CASE

Respondent Sexton takes issue with the statement of the case presented by Petitioner in the following respects:

1. There was no Texas court ruling "permitting the agreed, secret removal of court records having a potentially devastating impact on the public health, safety and welfare, without public notice and hearing." (Petition for Writ of Certiorari, pp. i, 14, 16-18).

2. No sealing order has been entered or approved by any Texas court. No sealing order has been requested by Sexton or Texaco arising out of Sexton's underlying lawsuit against Texaco and Texaco Chemical Co.

3. The statement of the case presented in Petitioner's Petition for a Writ of Certiorari fails to properly identify what documents Sexton agreed to return to Texaco and/or keep confidential. Sexton *did not agree* to return any of the pleadings, depositions or exhibits to depositions completed in the development and prosecution of his case nor did he agree to support a motion to seal the Court's records. Sexton also did not agree to return any of the documents Sexton had in his possession at the time of his termination which he produced to Texaco during the course of this litigation. The agreement on its face only applies to documents produced by Texaco. Sexton also did not agree to return or keep confidential the 21 documents which were submitted for *in camera* review since he never had possession of them.

4. The settlement agreement does not require the return or confidentiality of documents that are required by law to be open to the general public. To the contrary, the settlement agreement provides as follows:

> (a) Sexton will return to Texaco all documents and copies thereof produced *by Texaco* in this case. Sexton will keep confidential the information contained in the documents produced by Texaco, unless ordered by a court of competent jurisdiction to disclose these matters *or unless disclosure is otherwise required by legal process or law.*

Thus, contrary to Petitioner's representation that the settlement agreement "required Sexton to keep all information confidential as well as to return all records" (Petition for Writ of Certiorari, p. 7), the agreement only required return of records produced by Texaco and confidentiality of documents not otherwise required by law to be disclosed.

5. The trial court conducted an oral hearing on Petitioner's motions. At the time the trial court dismissed Petitioner's Petition in Intervention, it had before it the Affidavit of Sexton's lead counsel, Bain, which verified that no documents which would have a probable adverse effect upon the health or safety of the general public were subject to the settlement agreement's confidentiality provision. (Appendix B)

6. All documents concerning the risks which existed at the Austin Research Laboratory at the time of Sexton's discharge by Texaco (November 13, 1987), which Sexton had or was able to obtain during discovery in his case against Texaco, have been and continue to be on file with the trial court -- *unsealed*. These documents are accompanied by the affidavits of both Sexton and an independent expert interpreting the significance of those records. There are no documents concerning the conditions that existed at the Austin Research Laboratory, or any other Texaco Chemical Co. facility, that are not in summary judgment evidence or attached to the depositions. Therefore, these documents are no longer "unfiled discovery". They are open to the general public as part of the Court's record.

7. Petitioner's entire justification for its Motion to Recuse the Texas Supreme Court is based upon its allegation that hazardous conditions existed at the Austin Research Laboratory which is within the work and living area of the Texas Supreme Court Justices. (Petition for Writ of Certiorari, p. 10, "As to the Austin Research Laboratory, this area included the building housing the Texas Supreme Court. . ." and p. 17, "In this instance; however, it is what they *don't know* that *will or may* hurt them. The press and members of the Austin populace were denied knowledge of the allegation . . . as well as denied access to the documentation which supported the allegations made by John Sexton".) This appeal does not concern the risk analysis at the Austin

Research Laboratory. Copies of several different drafts of the risk analysis on the Austin Research Laboratory are included in the summary judgment evidence which was filed with the trial court. These documents are also attached to several deposition excerpts filed with the Court as part of that evidence. *There are no documents concerning the conditions that existed at the Austin Research Laboratory which have been sealed.* (Appendix B). Contrary to Petitioner's accusation that Sexton has agreed to conceal the contents of those documents, Sexton is the person responsible for making that information available to the public and, in order to do so, he sacrificed a 30-year exemplary career.

8. Sexton's case against Texaco continued for nearly three years in a bitter and unyielding discovery battle. Before it was settled, and in response to at least three motions for summary judgment filed by Texaco, Sexton accumulated in five volumes the documents reflecting the safety hazards and violations at the Texaco Chemical facilities which had been accumulated from any source during the course of the discovery process. These volumes were filed with the Court, where they remain as part of that Court's permanent record. Because the trial judge limited discovery to the period between November 13, 1985, and November 13, 1987, Sexton never obtained documents concerning current conditions at any of the four Texaco Chemical Co. facilities that were at issue in the case. The specific documents which were requested,

obtained by Sexton or refused by the trial court during the course of Sexton's case against Texaco are identified with particularity and with citations to the records in pages 5-12 of Sexton's Corrected Brief to the Fourteenth Court of Appeals in this case. Those pages are copied verbatim as Appendix A to this Brief.

SUMMARY OF ARGUMENT

Rule 76a is not applicable to this case because no documents have been sealed which meet the definition of "court record" under that rule. Because there are no sealed documents which meet the definition of "court record" or which affect any federally protected interest of Petitioner, no federal constitutional issue is presented.

Petitioner has not been denied access to the Court, equal protection or free speech. Petitioner does not have an unbridled right to all unfiled discovery in any court proceeding in the State of Texas. Rule 76a limits its application to documents outside of the Court's records only when there is a showing that documents (1) are sealed, and (2) involve issues that safety of the general public. This case simply does not involve those documents; therefore, the trial court and appellate court properly found that Rule 76a was not implicated under Texas law.

Petitioner and Davenport have relied on the Sexton affidavits (which are on file with the trial court, unsealed) concerning the conditions that existed at the Austin Research Laboratory at the time he was terminated by Texaco in November 1987 to invoke Rule 76a. Thus, they had knowledge of the alleged "interest" of the Texas Supreme Court Justices at the time their Application for Writ of Error

was filed. Petitioner's assertion that the Supreme Court's denial of writ somehow justifies its untimely filing of a Motion to Recuse is simply without merit.

Petitioner invoked the jurisdiction of the Texas Supreme Court to rule on the merits concerning the trial court and Court of Appeals' interpretation and application of Rule 76a, and the Courts' conclusion that they did not have jurisdiction over the Plea in Intervention filed by Petitioner and Davenport after the trial court's plenary jurisdiction had expired. These are issues of Texas law over which the Texas Supreme Court had proper jurisdiction. By denying Petitioner's Application for Writ of Error, the Texas Supreme Court found that the trial court's action and the opinion of the Fourteenth Court of Appeals, for the most part, correctly interpreted and applied Texas law. The Texas Supreme Court properly exercised its appellate jurisdiction over a ruling of the Fourteenth Court of Appeals interpreting state law jurisdiction which Petitioner invoked.

REASONS FOR DENYING THE WRIT

I. Because no documents or information concerning matters that "have a probable adverse effect upon the general public health or safety" have been sealed, Petitioner has no legally protected interest under federal or state law which entitles it to intervene in Sexton's lawsuit against Texaco.

In response to Petitioner's Plea in Intervention, Sexton filed with the trial court the Bain affidavit and letter to the First Court of Appeals verifying that any documents produced by Texaco pertaining to public health and safety were no longer unfiled discovery. (Appendix B). Neither Petitioner nor Davenport, who had formerly represented Sexton, presented the trial court with any evidence that

documents concerning the public health and safety were being returned or kept confidential.[2]

The settlement agreement presented to the trial court by Petitioner allowed disclosure of any information required by law to be disclosed. Under Rule 76a, any documents pertaining to matters that have a probable adverse effect upon the general public's health and safety are required by law to be disclosed on proper request. Sexton's lead counsel has never received a request from Petitioner to inspect any safety related discovery from this case. The only request by Davenport, Petitioner's Co-Plaintiff in intervention, are those attached hereto as Appendix C, seeking Sexton's medical records, not safety related material. Thus, even if there were safety related materials that had not been filed with the trial court, which there are not, the settlement agreement does not violate Rule 76a.

Although at one time Petitioner's counsel asserted that Rule 76a entitled her to inspect all unfiled discovery, including Sexton's medical records (see Appendix C), Petitioner has not and can not identify any federally protected right or interest that would entitle it to the relief sought without a showing that safety documents have been sealed. Throughout this proceeding, it has been Petitioner and its counsel's position that because safety related material was filed with the Court, there must be some that was not filed. Contrary to Petitioner's representation, Sexton's agreement to return Texaco documents did not "necessarily include

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[2] At oral argument before the Fourteenth Court of Appeals, Petitioner's counsel was asked what type of evidence the Court was required to hear, in her opinion, in order to comply with Rule 76a. Davenport responded that the Court would be required to receive testimony from Sexton's lead counsel that no safety related documents were being returned. Such testimony is included in the Bain affidavit. (Appendix B).

safety related unfiled discovery". (Petition, p. 14). The evidence is to the contrary.[3]

Petitioner's repeated representations to the Texas Court of Appeals, the Texas Supreme Court, and now this Court that the documents being returned by Sexton to Texaco contain information regarding the Austin Research Laboratory are grossly misleading and patently false. Davenport is or at the very least ought to be aware that all documents pertaining to the Austin Research Laboratory, and the conditions described in Sexton's affidavits, with the possible exception of the *in camera* documents which Sexton never received, have already been filed with the trial court. Without a Rule 76a "court record", the trial court simply had no jurisdiction to hear Petitioner's Plea. In the words of the Fourteenth Court of Appeals:

> In its dismissal of Intervenor's Plea in Intervention, the trial court found that no sealing order had been requested or entered in this case. After reviewing the entire record, there is no evidence that anything more than a Protective Order was executed by the trial court concerning the 21 safety documents. There is no evidence of a showing by

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[3] The documents which are contemplated by the settlement agreement include personnel files of Sexton and other Texaco employees, Texaco policy manuals, contractual agreements between Texaco and Sexton, Texaco business plans, Texaco's safety newsletters, documents relating to a dispute between Sexton and another employee at Texaco, annual reports, minutes of various meetings, memos concerning Sexton's performance, management guidelines, disciplinary action taken against various employees, and documents relevant to Sexton's claim of age discrimination. Disclosure of many of these documents would infringe upon the privacy rights of third parties who did not participate in this proceeding.

> Appellants to the trial court that the 21 documents constituted "court records". . . .[4]
>
> . . . Because of our holding . . . that Rule 76a was not implicated in the present case, the continuing jurisdiction paragraph contained within that rule is likewise inapplicable.

(Opinion of the Fourteenth Court of Appeals, Petitioner's Appendix B, pp. 4-5).

In *Ford Motor Co. v. Benson*, 846 S.W.2d 487, 491 (Tex. App. - Houston [14th Dist.] 1993, no writ), the Fourteenth Court of Appeals held that where no sealing order is requested by a party seeking a protective order, it is the non-movant's burden to establish that Rule 76a is implicated by establishing that some or all of the documents are court records. It is Respondent Sexton's position that because neither Sexton nor Texaco sought a sealing order, it was Petitioner's burden to establish that some documents that meet the definition of "court records" under Rule 76a had been sealed in order to invoke the continuing jurisdiction provisions of that rule. Petitioner failed to do so. The trial court's determination as to whether unfiled discovery meets the definition of "court records" under Rule 76a is a determination that is subject to review under the abuse of discretion standard. *Dunshie v. General Motors Corp.*, 822 S.W.2d 345 (Tex. App. - Beaumont 1992, no writ).

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[4] It is Sexton's position that the 21 safety documents subject to the protective order do relate to safety issues; however, Rule 76a appears to exempt those documents because they were only produced *in camera*. Sexton never received a copy of those documents.

II. The Texas Supreme Court did not find that the trial court had jurisdiction over the intervention. To the contrary, the Texas Supreme Court's denial of Petitioner's Application for Writ of Error with the notation "Writ Denied" indicates its ruling that the Fourteenth Court of Appeals properly found no jurisdiction.

Petitioner incorrectly attributes a finding of jurisdiction to the Texas Supreme Court's disposition of its Application for Writ of Error with the notation "Writ Denied". That notation signifies the Texas Supreme Court's approval of the Fourteenth Court of Appeals' interpretation of the law. Texas Rule of Appellate Procedure, Rule 133, which provides:

> In all cases where the Supreme Court is not satisfied that the Court of Appeals in all respects that correctly declared the law but is of the opinion that the application presents no error which requires reversal, or which is of such importance to the jurisprudence of the state so as to require correction, the Court will deny the application with the notation 'Writ Denied'.

The Texas Supreme Court is a court of limited jurisdiction. Texas Government Code, Section 22.001. In its application for Writ of Error to the Texas Supreme Court, Petitioner invoked that Court's jurisdiction pursuant to Texas Government Code Annotated, Sections 22.001(a)(2), (3) and (6). (Vernon 1988). Those sections provide in pertinent part:

Section 22.001. Jurisdiction.

(a) The Supreme Court has appellate jurisdiction, except in criminal law matters, co-extensive with the limits of the state and extending to all questions of law arising in the following cases when they have been brought to the courts of appeals from appealable judgment of the trial courts:

> (2) A case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the Supreme Court on a question of law material to a decision of the case;
>
> (3) A case involving the construction or validity of a statute necessary to a determination of the case;
>
> (6) Any other case in which it appears that an error of law has been committed by the Court of Appeals and that error is of such importance to the jurisprudence of the state that, in the opinion of the Supreme Court, it requires correction, but excluding those cases in which the jurisdiction of the Court of Appeals is made final by statute.

The Texas Supreme Court had jurisdiction to review the holding of the Fourteenth Court of Appeals that the trial court was without jurisdiction. A notation of "Writ Dismissed W.O.J." or "Dismissed for Want of Jurisdiction" would have indicated that there was a defect in the Supreme Court's jurisdiction to hear the matter. Texas Rule of Appellate Procedure, Rule 133. The Texas Supreme Court had jurisdiction to review the Fourteenth Court of Appeals conclusions of law and did so. Furthermore, it had jurisdiction to review Petitioner's contention that the opinion of the Fourteenth Court of Appeals conflicted with other cases interpreting Rule 76a. By denying the writ with the notation "Writ Denied", the Texas Supreme Court merely declared its determination that the opinion of the Court of Appeals, while not correct in all respects, did not contain any legal errors sufficient to require reversal or of sufficient judicial significance to require correction.

Finally, if Petitioner had timely raised an argument that the construction placed by the Fourteenth Court of Appeals upon Rule 76a put that law in conflict with the Constitution of the United States, the Texas Supreme Court had jurisdiction to consider it. *Albertype Co. v. Gust Feist Co.*, 102 Tex. 219, 114 S.W. 791 (1909) (holding "Where the construction placed by the Court of Civil Appeals upon a law puts that law in conflict with the Constitution of the United States, the validity of the law is involved, and an appeal will lie to the Supreme Court.") In this respect, Respondent Sexton agrees with the argument and authorities submitted by Respondent Texaco and Texaco Chemical Co. on pages 6-8 of their Brief in Opposition to the Petition for Writ of Certiorari, that Petitioner failed to timely assert the constitutional claims it now asks this Court to consider.

CONCLUSION

The Texas Supreme Court properly approved the Fourteenth Court of Appeals' holding that Rule 76a was not implicated in this case and therefore the continuing jurisdiction provision of Rule 76a could not provide the trial court or the court of appeals with continuing jurisdiction over the controversy. That ruling, as reflected by the Supreme Court's denial of Petitioner's Application for Writ of Error, is an interpretation of state law by the state's final authority. Petitioner failed to preserve any federal constitutional issues regarding the interpretation of Texas Rule of Civil Procedure, Rule 76a, in order to properly invoke this Court's jurisdiction. But more importantly, there has been no violation of Petitioner's constitutionally protected rights or interests since no information or documents that pertain to matters which have a probable adverse effect upon the health or safety of the general public have been removed from the public domain, destroyed, or otherwise sealed. All such records remain open to Petitioner as part of the trial court's record in this proceeding. Based upon the foregoing, Respondent Sexton requests that this Court deny the Petition for Writ of Certiorari filed by Texas United Education Fund. Respondent Sexton requests all other relief to which this Court deems him justly entitled.

Respectfully submitted,

JOAN LUCCI BAIN, P.C.
Counsel of Record
State Bar No. 01548020
P.O. Box 79467
Three Riverway, Suite 950
Houston, Texas 77279
(713)468-0647 or 871-0660
(713) 871-1861 (FAX)

ATTORNEY FOR RESPONDENT,
JOHN R. SEXTON

APPENDIX A

IN THE COURT OF APPEALS
FOR THE STATE OF TEXAS
FOURTEENTH SUPREME JUDICIAL DISTRICT

NO. 14-92-01201-CV
Trial Court No. 89-06630

TEXANS UNITED EDUCATION FUND
and VALORIE W. DAVENPORT,
Appellees

v.

TEXACO, INC. and TEXACO CHEMICAL CO.,
Appellees

and

JOHN R. SEXTON,
Appellee

CORRECTED BRIEF FOR APPELLEE SEXTON

ORAL
ARGUMENT
REQUESTED

Respectfully submitted,
NELKIN & NELKIN, P.C.
JOAN M. LUCCI BAIN
SBOT No. 01548020
5417 Chaucer
Houston, Texas 77005
P.O. Box 25303
Houston, Texas 77265
713/526-4500 (Tel)
713/526-8915 (FAX)
ATTORNEY FOR APPELLEE

JOHN R. SEXTON

STATEMENT OF FACTS

In order to understand the facts pertinent to this appeal, it is necessary to have an accurate understanding of Sexton's case and the historical development of document production in the underlying cause.

At the time of his discharge, Sexton had been head of the Corporate Safety Department at Texaco, Inc. for nearly a decade. In that capacity he was ultimately responsible for the safety function at Texaco facilities worldwide. In late 1984 and early 1985, under Sexton's direction, Corporate Safety began implementing a hazard assessment program company-wide. (lst Supp. Tr. Pp. 8-9). Sexton has always maintained that he was terminated because hazard assessment reviews conducted by him at four Texaco Chemical Company facilities revealed various unsafe conditions, some of which posed a serious risk of catastrophic incident, and Sexton insisted repeatedly that Texaco Chemical take further action to better evaluate the risks and remedial action to minimize those risks. (1st Supp. Tr., Pp. 16-23). The risk analysis program concentrated on Texaco Chemical Company facilities. The risk analysis program was an attempt by Sexton to determine whether any conditions existed that posed a serious risk to either Texaco workers or the public at large, and whether any violations of applicable safety and environmental laws existed at the facilities. The first stage of the hazard assessment was company-wide. Each facility was asked to do an internal review of specific items identified by Corporate Safety. These internal preliminary inspections were referred to as Potential Accident Liability Evaluations or "P.A.L.E." reports. The P.A.L.E. reports were forwarded from teams conducting the initial inspection to Sexton who reviewed the and forwarded them to Texaco's corporate and outside counsel with recommendations for any necessary remedial action. These reports and

recommendations were eventually returned to Sexton, who then distributed them to the applicable facility. (Petition for Writ of Mandamus, Attachment I, Exhibits "A" and "B").

The P.A.L.E. reports are not the subject of the settlement agreement between Sexton and Defendants. Although requested, Sexton was never able to obtain copies of those reports in the discovery in this cause, because they were completed before November 1985. Some of the P.A.L.E. reports are included on the Defendants' Privileged Document Inventory. These are the documents, together with Sexton's correspondence to and from Texaco's counsel, which Texaco refused to produce, and were submitted to the Court for in camera inspection. Neither Sexton nor his counsel has agreed to return or keep confidential the contents of any of the P.A.L.E. reports, as he never obtained them from Texaco.

After the results of the P.A.L.E. reports were reviewed, Sexton initiated a more detailed hazard assessment at select Texaco Chemical facilities where potential problems had been identified. These "hazard assessments" were conducted by a team which included representatives from Corporate Safety, Texaco Chemical, and the facility itself, and provided a more detailed analysis of the conditions existing at the subject facilities. Hazard assessments were conducted at four Texaco Chemical facilities.[1] The hazard assessments revealed serious safety deficiencies, including

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[1] Sexton was also not able to obtain the hazard assessment reports from all four facilities during discovery because they were conducted in early 1985, and the trial court limited discovery to the period from November 13, 1985 through November 13, 1987. Although the trial court's record does contain some documents from the hazard assessments, these were documents Sexton had maintained, and were produced to; not by, Texaco. They, too, are exempt from the Settlement Agreement which only required return of documents produced by Texaco.

many statutory violations at one Texaco Chemical Company facility, the Austin Research Laboratory.[2] (Petition for Writ of Mandamus, Attachment I, 1st Supp. Tr. Pp. 8-23). To compound the problem, that facility stored and used several extremely volatile and toxic chemicals. As a result, Sexton began pushing Texaco Chemical to conduct an extremely detailed review of conditions at that facility with the objective of determining the potential risk of accidental chemical releases, and the seriousness that such a release would have on the general public. This detailed review was referred to as "risk analysis:. Because the chemicals stored and utilized at that facility were highly volatile, toxic, and in close proximity to a highly populated area, and based upon his own analysis of the seriousness of the violation at issue, Sexton determined that conditions at that laboratory posed a serious risk of injury or death to thousands of people in the Austin, Texas area. (1st Supp. Tr. Pp. 8-29).. It took Sexton over a year to convince Texaco Chemical to proceed with the risk analysis, which included "vapor release modeling' to determine the degree of toxicity in the event of an accidental release.

This appeal does not concern the risk analysis at the Austin Research Laboratory. Copies of several different drafts of the risk analysis report are included in the summary judgment evidence filed with the trial court and are attached to depositions. Furthermore, the documents which have been filed with the Court in connection with Sexton's responses to

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[2] Texaco has continued to deny the existence of any safety hazards; however, Defendants' expert, Herb Miller (who was also Sexton's replacement), admitted in testimony and during his deposition that he was unqualified to render any opinion on violations of safety regulations. Sexton, who is imminently qualified, offered his own affidavit testimony, and the affidavit of an independent expert to interpret the results of the risk analysis at the Austin Research Laboratory. (1st Supp. Tr. 8-23, 2nd Supp. Tr. 6).

Texaco's numerous motions for summary judgment, are accompanied by the affidavits of both Sexton and another expert interpreting the significance of those reports. The results of the vapor release modeling are also included in that evidence. There are no documents concerning the conditions that existed at the Austin Research Laboratory that are not in summary judgment evidence or attached to depositions. Despite Appellants' accusation that Sexton has agreed to conceal the contents of those documents, Sexton is the person responsible for making that information available to the public.

For nearly three years Sexton pursued his claims against Texaco in what was a bitter and unyielding discovery battle. The Defendants engaged in numerous abusive and dilatory tactics without retribution from the trial court, despite Sexton's repeated motions to compel and request for sanction. (See, generally, Attachments E, G, H, K, and N to Sexton's Petition for Writ of Mandamus).[3] Davenport was retained in early 1990 to perform services in connection with the underlying cause; however, Sexton's lead counsel throughout the proceeding was Bain of Nelkin & Nelkin. P.C.

Sexton produced to Texaco numerous documents he had in his possession reflecting the dispute he had with Texaco Chemical over conditions at Texaco Chemical facilities, and his insistence on compliance with safety and environmental regulation. These documents are identified in the record by the initials JRS preceding the numerical

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[3] All references to Plaintiff's Petition for Writ of Mandamus are to the Petition for Writ of Mandamus filed by John R. Sexton on January 22, 1992, in Cause No. 01-92-00020-CV, which record has been included in the record for purposes of appeal pursuant to this Court's Order dated December 3, 1992.

designation. (see, e.g., Petition for Writ of Mandamus, Attachment I, Exhibit "A"). These documents are also excluded from the settlement agreement, as Sexton agreed only to return documents produced by Texaco.

Texaco filed the first of three motions for summary judgment in this case in October, 1989, before Davenport was involved in the case.[4] Thus, all of the representations made by Appellants on page 4 of their Brief concerning what took place at the hearing on that summary judgment are not only inaccurate but pure speculation since Davenport was not in attendance at the hearing.[5] Furthermore, neither the First Motion for Summary Judgment nor the Motion for Rehearing on that motion have any bearing on this case since Plaintiff was forced to respond without the benefit of any discovery from Texaco.[6] (Although Sexton had a Motion to Compel Discovery on file at the time, Judge Chambers did not rule on it for over a year.) At the hearing on that motion to compel conducted February 20, 1981, Judge Chambers

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[4] Contrary to Appellants' representation in their brief, that motion did not address Sexton's claim for wrongful discharge under Sabine Pilot, as Sexton at that time had not alleged a cause of action under Sabine pilot, and was relying on a contractual claim. In responding to that motion, Sexton's response briefly addressed a Sabine pilot claim as an alternative to the contractual claim.

[5] Appellants' General Statement of Facts implies that after Davenport was retained, she somehow facilitated or controlled the course of these discovery disputes and amendments to pleadings. While Davenport did appear at hearing, and while there were vigorous arguments, Davenport actually prepared only two pleadings. She also assisted in the preparation of the Petition for Writ of Mandamus.

[6] Although Sexton served each of the four Defendants with a Request for Production of Documents shortly after this suit was filed, he was unable to obtain any responsive documents from Texaco until May of 1991. (See, Petition for Writ of Mandamus, Pp. 6-7).

agreed to enter the April 12, 1991 Order regarding the mutual use and disclosure of documents which Appellants now contend constitutes the first sealing order. Judge Chambers also limited discovery to the period between November 13, 1985 and November 13, 1987.[7] This and a subsequent order finding the 21 documents which included P.A.L.E. reports to be privileged, were the subject of the Petition for Writ of Mandamus filed by Sexton in January of 1992. (Petition for Writ of Mandamus, Attachments C and D).

Despite her current denial, Davenport was present at the February 20, 1991 hearing when Judge Chambers ordered the parties to enter into a Protective Order regarding confidentiality. (February 20, 1991, S.O.F. p.2)[8] The interim Confidentiality Order was discussed openly in her presence at that hearing:

> Ms. Bain: The Plaintiffs [sic] have offered to enter into confidentiality agreements so that it's clear that is not the problem with the production . . .
>
> . . . . . .
>
> Mr. Clover: I take it that counsel's offer of confidentiality agreement, I would like to have it actually court ordered.

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[7] Sexton was terminated on November 13, 1987, and Judge Chambers ruled that discovery would be limited to a period of two years prior to his discharge. Judge Chambers denied discovery as to anything subsequent to Sexton's discharge.

[8] The February 20, 1991 Statement of Facts is part of the Record transferred to this Court from the First Court of Appeals.

The Court: Not to used for anything other than this lawsuit.

(February 20, 1991 S.O.S., Pp. 173, 187-188). In addition, when Bain was circulating the proposed order to be entered, Davenport was copied.[9]

Finally, on May 3, 1991, Sexton received some documents responsive to his Request for Production.[10] Thereafter, Sexton began deposing various parties and witnesses. Over the course of several months, Bain deposed several employees at Texaco, including the two individual Defendants, and Texaco's designated expert, Herb Miller. The documents produced by Texaco relating to safety issues at the various Texaco facilities were attached as exhibits and discussed thoroughly with the deponents. In the meantime, Texaco filed two more motions for summary judgment and set them for hearing. Sexton filed motions for continuance on each of those summary judgment hearings and finally was successful in obtaining a ruling from the Court that the depositions be completed before entertaining the Defendants' motions for summary judgment. (Petition for Writ of

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[9] See March 1, 1991 letter to Glen E. Clover, Appendix A., p. 2).

[10] These documents are identifiable by their Bates stamps numbers MX00536-MX07355. (2 Supp. Tr. 18). These are the only documents Texaco produced other than documents produced on September 1, 1989. On that date Texaco produced (1) Sexton's personnel file; (2) blank performance appraisal forms; (3) Texaco procedures for completing performance appraisals; (4) Texaco's procedures for disciplinary action; and (5) early retirement and separation packages. (Petition for Writ of Mandamus, p. 6, n.3; Attachment E, p. 7).

Mandamus, Pp. 8-9).[11] After completing the depositions, Bain accumulated the additional evidence obtained through discovery from the Defendants in support of Sexton's claims, including the documents produced by Defendants on May 3, 1991. These were submitted to the Court in five volumes which included affidavits with exhibits and excerpts from the depositions. A Supplemental Statement of Facts was also submitted to the Court which was annotated to the record. These volumes contain documents reflecting conditions of the Texaco Chemical Company facilities. These documents produced by Defendants, later filed with the Court, or used in depositions, are no longer "unfilled discovery' under Rule 76a.

On January 22, 1992, Sexton's Petition for Writ of Mandamus was filed with the First Court of Appeals in Cause No. 01-92-00028-CV styled John R. Sexton v. The

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[11] During the period that Bain was attempting both to schedule and complete the depositions and to obtain the 21 documents withheld by Defendants through Plaintiff's Second Motion to Compel (Petition for Writ of Mandamus, Attachments "H' and "N'), Defendants filed the Second Motion for Summary Judgment seeking to dismiss Plaintiff's claims under Sabine Pilot, Winters, and the Texas Hazard Communication Act. On September 20, 1991, the Defendants filed a Third Motion for Summary Judgment addressing Plaintiff's claims for age discrimination. On October 11, 1991, the trial court heard arguments on Plaintiff's Second Motion to Compel, and Defendants' Motion for Protective Order. The hearing was resumed on November 1, 1991, at which time Judge Chambers denied Plaintiff's Second Motion to Compel Production of the 21 withheld documents (primarily P.A.L.E. reports), granted Texaco's Motion for Protective Order, and Texaco's Second Motion for Partial Summary Judgment. However, Judge Chambers did not sign the order denying Plaintiff's Second Motion to Compel Production of Documents (and granting Defendants' Motion for Protection) until January 15, 1992. Defendant's Third Motion for Summary Judgment, addressing Plaintiff's final cause of action, was set for hearing on January 24, 1992. (Petition for Writ of Mandamus, Pp. 8-9, and attachments referenced therein).

Honorable Eugene Chambers. [12] The case had been set several months earlier for court ordered mediation on January 27, 1992. Sexton reached an agreement at the mediation to settle all of his claims against Texaco. Davenport, however, left the mediation after a disagreement with Sexton, before any settlement agreement was prepared. She stated repeatedly that she did not want the case to settle until after the mandamus was concluded and disagreed with Sexton's decision to do so. She did not at any time during the mediation state "her concern that any agreement which required continued confidentiality of safety information (or the release and return of safety related discovery) violated the Rules of Civil Procedure and therefore could not be a condition of settlement", not did she "admonish" Nelkin & Nelkin of her "concern".[13] (Appellants' Brief, p. 6). The Settlement Agreement signed at the mediation does not include any provision concerning return or confidentiality of documents. (Appellants' Response to Appellees' Motion to Dismiss Appeal, Exhibit "A"). Rather, it merely required the parties to keep confidential the terms of the Settlement Agreement, a provision to which Davenport as Sexton's counsel owned Sexton the duty to abide by."

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[12] Appellants' Brief states that Davenport prepared the petition and filed it "with attorneys from Nelkin & Nelkin". The Petition was actually prepared by Bain and forwarded to Davenport, for her input. After some additions and changes suggested by Davenport were included, Bain filed the Petition on January 22, 1992.

[13] Bain raised the issue of confidentiality in discussions with McGown at the time the final Settlement Agreement was signed late that evening because Sexton could not and would not agree to keep confidential the reasons for his discharge and the events that led up to his discharge for reasons in addition to Rule 76a.

APPENDIX B

No. 01-92-00028-CV

IN THE FIRST COURT OF APPEALS
Houston, Texas

JOHN R. SEXTON,

Relator

VS.

THE HONORABLE EUGENE CHAMBERS,
Judge of the 215th District Court,
Harris County, Texas,

Respondent

TEXACO, INC., TEXACO CHEMICAL CO.,
W.B. REALS and LOUIS GABRECHT, JR.,

Real Parties in Interest

AFFIDAVIT OF JOAN M. LUCCI BAIN

THE STATE OF TEXAS §

COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared Joan M. Lucci Bain, who being by me first duly sworn upon her oath deposes and says the following:

1. "My name is Joan M. Lucci Bain. I am the attorney for John R. Sexton, Plaintiff in Cause No. 89-006630, in the 215th Judicial District Court of Harris

County, Texas, and Relator in Cause No. 01-92-00028-CV, a mandamus proceeding pending in the Court of Appeals for the First Supreme Judicial District of Texas.

2. I am lead counsel for John R. Sexton in both the trial and appellate court action listed above. In January 1990, Ms. Valorie Davenport was retained as a consultant, primarily for court appearances. During the course of the litigation, Ms. Davenport only drafted one motion, a Supplemental Motion to Compel Discovery filed in January 1990. All of the remaining pleadings were drafted by me, and some but not all were forwarded to Ms. Davenport to review prior to hearings.

3. The Petition for Mandamus which is pending in this Court was prepared jointly by myself and Ms. Davenport, I prepared the initial and second drafts, which were forwarded to her. She and I both made revisions to that draft before the final Petition was filed.

4. "I have reviewed the affidavits of Glen E. Clover attached to Texaco's Motion to Strike, or in the Alternative to Deny Relator's Supplemental Motion to Dismiss and the Affidavit of Valorie Davenport attached to her Response to Defendants' Motion to Strike Supplemental Motion to Dismiss filed March 5, 1992._____.

5. "Mr. Clover states that I told him I had not authorized Ms. Davenport to file Relator's Supplemental Motion to Dismiss, that I had not reviewed the supplemental motion before it was filed, and that to the best of my knowledge Mr. Sexton had

also not read the supplemental motion or authorized its filing on his behalf. I believe this characterization of our conversation is incomplete and inaccurately characterizes some of the statements I made.

6. "I did tell Mr. Clover during our February 23, 1992 conversation that I was unaware that the supplemental motion had been filed until after it had been filed This a true statement.

7. "I also discussed several other matters with Mr. Clover, including the fact that, based upon my review of Rule 76A, I did not feel the settlement agreement reached in this action violates that rule, primarily on the basis that the documents that are in my possession reflecting conditions at Texaco facilities were supplied to me by Mr. Sexton, not Texaco. (The settlement agreement called for return of documents provided by Texaco in the action). The only documents first produced by Texaco which reflect those conditions have been filed with the trial court as exhibits to pleadings. These are, therefore, part of the public record.

8. "The 21 documents which are the subject of the mandamus proceeding and the primary focus of Ms. Davenport's supplemental motion have never been in my possession. Thus, it is my understanding that the only documents which may reflect conditions that are dangerous to the public which are not a part of the trial and appellate court records are the 21 documents which are the subject of the mandamus proceeding.

9. "During our conversation on Friday, February 21, 1992, I informed Mr. Clover that in my opinion the provision in the agreement requiring that the

documents be returned and the information kept confidential "unless otherwise required by law" would govern, so that no violation of Rule 76A was possible..

10. "Mr. Clover acknowledged that he and Mr. Mitchell had received Ms. Davenport's February 10, 1992, letter expressing her concern before the final documents were signed, and had not responded. I told him that I did not receive a copy of that letter.

11. "During my conversation with Mr. Clover, it was obvious he had just learned of the filing of the Supplemental Motion to Dismiss. He indicated that he felt that Texaco would probably seek sanctions against Ms. Davenport for her filing. I informed him at that time that felt that motion for sanctions would be inappropriate since I truly believed that Ms. Davenport had filed the supplement in good faith effort to determine her ethical responsibilities. This firm, Mr. Sexton, and I all stand ready to abide by any ruling the First Court of Appeals may make. Neither we nor Mr. Sexton ever intended to violate any provision of Rule 76A by agreeing to return to Texas the documents Texaco had produced during the proceedings.

12. "To address Ms. Davenport's affidavit, I raised the problem of a blanket "confidentiality agreement' at the mediation and in the context of the proposed final settlement agreement. In fact, I forwarded a copy of that agreement to Ms. Davenport. Ms. Davenport did not send me a copy of her February 10,1992 letter to Messrs. Clover and Mitchell or even tell me she had sent it. I did not speak to her again until after the settlement agreement had been signed, and motions to

dismiss had been filed in both the trial and appellate courts, although I had left several messages at her office which were not returned.

13. On February 18 or 19, 1992, I spoke with Ms.Davenport to let her know that all final documents had been exchanged and filed. At that time she told me of her February 10,1992 letter. I explained to her that neither Mr. Clover nor Mr. Mitchell brought the letter to my attention, and we began to discuss her concern that the settlement agreement might violate Rule 76A,Tex. R. Civ. Pro. I explained to her that I did not think that the agreement violated the rule for several reasons. First, the majority of the documents which I have in my possession which reflect the conditions about which Mr. Sexton complained prior to his discharge in November 1987 were not documents produced by Texaco, therefore, they are not the subject of the confidentiality provision of the settlement agreement. That agreement only requires return of documents produced by Texaco. Further, I explained that the few (less than five) documents produced by Texaco dealing with safety issues had already been filed with the trial court and this Court as exhibits to various motions or responses to motions which I filed on Mr. Sexton's behalf. Texaco did not file, nor did I agree to, any motion to seal the court's record. Therefore, these few documents which I agree to return to Texaco are, and will remain public record. Thirdly, the 21 documents which are the subject of this mandamus proceeding are not in my possession or the possession of my client. We did not agree to return those documents or to keep their contents confidential, since we never had them. Finally the provision in the agreement regarding keeping information confidential is also limited to

documents produced by Texaco, and further allows Mr. Sexton to disclose that information if required to do so by law. Several of Mr. Sexton's affidavits and the affidavit of an expert, Mattson, are already on file with the Court explaining the information contained in these documents.

14. Paragraph 5 of Ms. Davenport's affidavit fails to distinguish between these three different categories of documents. Rather, it implies I obtained "copies" of documents I agreed to return from "another source". This is simply not the case. Neither Mr. Sexton nor I agreed to return any documents obtained from other sources. Furthermore, it is the documents from other sources which primarily reflect the safety hazards which were the subject of Mr. Sexton's case. Perhaps Ms. Davenport's misconception arises from her lack of familiarity with the source of the documents she has seen, since I have handled all of the document productions.

15. I also feel that is important to point out that due to Judge Chamber's discovery orders, I was unable to conduct any discovery to determine the status of the conditions which caused Mr. Sexton concern for any period after November 13, 1987. This was another subject of the mandamus proceeding. I, therefore, have no current information from any source regarding any present conditions.

16 "Ms. Davenport did inform me on February 19, 1992, that she was considering filing a supplement to the Motion to Dismiss. She agreed to send me a copy for my review and consideration before it was filed. On Wednesday afternoon, February 19, 1992, she had a draft copy of the proposed motion hand-delivered to

my office; however, the delivery was first reviewed by a partner in the firm and I left for an afternoon meeting unaware that it had been received. Ms. Davenport did not tell me during our conversation that morning that she intended to file the motion that afternoon. On February 20th, I was served with a copy of the motion which had been filed the day before. I did not discuss these conversations with Mr. Clover, although I did tell him I believed Ms. Davenport felt strongly that filing the motion was appropriate, and I did not believe that she would voluntarily withdraw the motion.

17. "After my conversation with Mr. Clover, I was informed by Ms. Davenport that the Court Clerk informed her that if any additional motion was to be considered, it had to be filed as soon as possible. She also stated that any extended delay could result in the Court's acting on the pending Motion to Dismiss without knowledge of the Rule 76A question. Ms. Davenport stated that when she heard nothing from my office in response to hand delivery on February 20, 1992, she decided to file the motion with the Court of Appeals immediately before the close of business Thursday afternoon.

Further Affiant sayeth not.

/s/ Joan M. Lucci Bain
JOAN M. LUCCI BAIN

SUBSCRIBED AND SWORN TO before me by Joan M. Lucci Bain on this 6 day of March, 1992.

/s/ Mary Ruth Kegarise
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

NELKIN & NELKIN
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TELEPHONE (713)526-4500 | 5417 CHAUCER P.O. BOX 253103 HOUSTON, TEXAS 77265 | TELECOPIER (713)526-8915

May 8, 1992

The Court of Appeals
First Supreme Judicial District
1307 San Jacinto, 10th Floor
Houston, Texas 77002

Re: Cause No. 01-92-0028-CV;*John R. Sexton v. The Honorable Eugene Chambers*

TO THE HONORABLE JUSTICES OF THE FIRST COURT OF APPEALS;

This letter is Relator's response to the April 2, 1992 and April 30, 1992 letters to the Court of Valorie W. Davenport, and to the April 27, 1992 letter to the Court submitted by Glen E. Clover on behalf of the Real Parties of Interest. This letter will also serve to advise the Court that Ms. Davenport has no further authority to represent Relator, and that the undersigned is the sole remaining counsel with authority to act on behalf of Relator John R. Sexton in this matter. All of the filings in this proceeding subsequent to the filing of the original Motion for Leave to File Petition for Writ of Mandamus and Petition for Writ of Mandamus should be considered filing by Ms. Davenport on her own behalf, <u>not</u> as filings on behalf of Relator.

Relator's counsel was not served with a copy of either the April 2, 1992 or April 30, 1992 filing by Ms. Davenport. It was not until April 29, 1992 that Relator became aware of

the April 2nd letter, when Relator's counsel received the response of the Real Parties in Interest. Relator's counsel finally obtained a copy of the April 2nd letter on May 4, 1992. In the future, should this Court receive any filings that do not reflect that counsel for Relator has been properly served in accordance with the Texas Rules, Relator respectfully requests that those filings be stricken from the record.

RELATOR'S RESPONSE TO APRIL 2, 1992 DAVENPORT LETTER.

In paragraph 2 of her April 2, 1992 letter, Davenport states that the settlement agreement entered into between Relator and the Defendants in the underlying action requires a "purging" of the files of Relator's counsel, including "material produced by Texaco which may have a probable adverse effect upon the public health and safety." This statement, ignores the detailed explanation provided in the undersigned's affidavit of March 6, 1992 which specifies that the documents to be returned to Texaco do not include documents which reflect conditions which may have probable adverse effect on the public because those documents were either (a) obtained from other sources; or (b) attached to pleadings. These are also attached to depositions. The settlement agreement does not require Relator or his counsel to return pleadings or depositions to Texaco. Those documents will be retained in accordance with the usual retention policy of Nelkin & Nelkin. Thus, neither Relator nor his counsel, entered into an agreement to "purge" their files, or to obstruct access to those documents which reflect conditions which may have a probable adverse effect on public health and safety. To the contrary, it is largely due to Relator's efforts in the underlying lawsuit that those records are now available to the public. The settlement agreement, and the March 6th affidavit of Relator's counsel is clear, that

any information obtained from other sources will not be returned to Texaco. In fact, the documents being returned to Texaco are documents such as personnel files, Texaco employment policies and manuals, business plans, and similar documents which simply have no impact on the public health and safety. Further, the settlement agreement provides that if required by law to disclose the contents of any material returned, Relator will do so. Those few documents produced by Texaco which in fact reflect safety inspections will be maintained both as a part of the Court's record, and the pleading files and depositions retained by the undersigned. Even Ms. Davenport must concede that there is no requirement in Rule 76A that unfiled discovery which does not have any impact on the public health and safety be maintained by counsel and made available for public inspection.

As stated in the March 6, 1992 affidavit of Relator's counsel the twenty-one (21) documents which were produced in camera, are not, and never have been in the possession of Relator's counsel, or of Relator since his termination from Texaco in 1987. It is Relator's position that these documents are not the subject of the confidentiality provision contained in the settlement agreement. None of the twenty-one (21) documents at issue reflect current conditions that exist at Texaco facilities. In fact, a primary issue raised by Relator in the mandamus proceeding was Respondent's failure to allow Relator to discover the current conditions a the Texaco Chemical facilities. Although Ms. Davenport focuses on the conditions at the Austin Research Laboratory, there were three other Texaco Chemical Company facilities involved. These twenty-one (21) documents were critical to the allegations of Relator's case in that they reflected Relator's personal efforts to remedy the conditions which are identified in those reports, demonstrating not only the severity of the

conditions that existed at the time, but also Texaco's motivation for terminating him.

The question of whether documents filed in camera constitute "unfiled discovery" within the meaning of Rule 76A is a novel issue which must be determined by this Court. Relator and his counsel resent the continued unfounded accusations by Ms. Davenport that Relator or his counsel entered into a confidentiality agreement relating to the twenty-one (21) documents which have been filed for in camera inspection, since that agreement does not even mention those documents. This Court's determination with regard to the disposition of those documents will be instructive to Relator, Respondent, and all counsel and parties involved. Should this Court determine that a custodian is necessary for these documents, the undersigned would be more than willing to include those documents within her permanent file retained in accordance with this firm's file retention policy. The undersigned counsel has done nothing "to assist Texaco's destruction of the twenty-one (21) documents filed in-camera. Furthermore, Relator's pleadings and affidavits concerning the contents of those documents, contain nothing to suggest that Relator ever contended that those documents reflect current conditions that exist at the Austin lab or any other facility. To the contrary, it was Relator's position that additional discovery was necessary to determine what current conditions exist. This never occurred.

Finally, with regard to Ms. Davenport's "authority" to file the Supplemental Motion to Dismiss, as Relator's counsel explained in her affidavit of March 6, 1992, Ms. Davenport filed the supplemental motion without the knowledge of Relator or his counsel. It has always been the undersigned's position that Ms. Davenport has the right to seek instruction from this Court on her own behalf regarding her own ethical responsibilities as an attorney relating to

Rule 76a. She dose not, however have the right to make statements purportedly on behalf of Relator which do not accurately characterize his prior testimony or the settlement agreement. There are several inaccurate statements contained in Ms. Davenport's Supplemental Motion to Dismiss which she attributes to Relator. Unfortunately these statements and others that were not made during the hearing of March 9, 1992, were reported in the Houston Press article submitted with the April 27, 1992 letter of Glen E. Clover. Thus, Ms. Davenport's failure to heed her responsibility to insure that her pleadings are factually accurate has proved damaging to her former client.

In spite of the foregoing, Relator and his counsel urge this Court to set aside the petty arguments among counsel regarding the other's motivations and/or actions, and responsibilities, and turn its attention to the more important issue before it, specifically the proper disposition of the twenty-one (21) documents currently being held by Respondent. Should this Court also determine that Rule 76a is applicable to the confidentiality provision of the settlement agreement, Relator and his counsel will respectfully abide by this Court's ruling.

RESPONSE TO THE APRIL 27, 1992 REPLY OF TEXACO, ET AL.

In his April 27, 1992 Reply to the letter of Ms. Davenport, Glen E. Clover, counsel for the Real Parties in Interest refers to a short excerpt from some "deposition" testimony of John R. Sexton, Relator, in an unrelated case. This excerpt, which is from a deposition not in the possession of the undersigned, is not properly authenticated, or before this Court. Nonetheless, because Mr. Clover's letter insinuates that there are inconsistencies between that testimony and the allegations of Relator in this case, Relator

feels compelled to respond. As reflected in the attached affidavits of Relator which have previously been submitted in this cause, Relator served as Manager of Texaco' corporate Safety Department for a decade. During that entire period he received outstanding performance appraisals. It always has been the position of Relator that while he was in charge of Texaco's corporate safety department, he emphasized the importance of safety related issues. As a result of the programs he implemented, in 1986, Texaco enjoyed its best safety record ever. In fact, Relator's testimony in this action has consistently been that prior to 1986, he received the cooperation of most Texaco departments, but that he encountered resistance from Texaco Chemical Company when he instituted a program of hazard assessments and safety reviews at that subsidiary's facilities. Relator has also testified that Texaco Chemical Company was the only department that was reluctant to comply with the safety programs he had implemented as Manager of Corporate Safety. Thus, Relator's "testimony" in Mr. Clover's letter that "prior to 1987 Texaco had a good safety program and a good safety record" is fully consistent with Relator's testimony in this action. Mr. Clover's insinuation that Relator has in any way contradicted his testimony in this action is simply not true.

RESPONSE TO APRIL 30, 1992 LETTER OF VALORIE DAVENPORT

In the last paragraph of her April 30, 1992 letter Ms. Davenport attempts to address the deposition excerpt referred to in the April 27th letter from Mr. Clover. Relator expressly rejects Ms. Davenport's characterization, or rationalization which is based upon her speculation. In fact, as explained above, that testimony, assuming it to be an accurate transcription, is fully consistent with Relator's testimony in this action.

In summary, neither Relator, nor his counsel have agreed to return or keep confidential the contents of any documents which are currently on file with any court as part of the pleadings in this case. The twenty-one (21) documents which were submitted to the 215th Court for an in camera inspection, are also not contemplated by the settlement agreement. Their contents do reflect hazardous conditions that existed at Texaco and Texaco Chemical Company facilities as of the time those documents were prepared. Relator and his counsel stand ready to abide by this Court's ruling with regard to the disposition of any of the documents obtained through discovery in this case. Relator has no information regarding current conditions at any Texaco facilities since that information was withheld from him under the Respondent's discovery orders.

Respectfully submitted

s/ Joan M Lucci Bain
Joan M. Lucci Bain
Counsel for Relator

JMLB/kib
Enclosures

cc w/Enclosures: Ms. Valorie Davenport
4300 Scotland
Houston, Texas 77007

Mr. J. Mart Mitchell
Texaco, Inc.
Box 52332
1111 Rusk at Fannin
Houston, Texas 77002

Mr. Glen E. Clover
Sugar Creek National Bank Building
Suite 865

One Sugar Creek Center Blvd.
Sugar Land, Texas 77478

Mr. John Sexton
2334 Lake Village Drive
Kingwood, Texas 77339

APPENDIX C

VALORIE W. DAVENPORT
1106 Louisiana, Suit 4450 • Houston, Texas 77002
Phone: 713-655-1500 • Facsimile: 713-655-0077

Valorie W. Davenport
Attorney at Law

May 24, 1993

Ms. Joanie Bain
Nelkin & Nelkin
5417 Chaucer
Houston, Texas 77005

Re: No: 89-006630; John R. Sexton vs. Texaco, Inc, et al.

Dear Ms. Bain:

I request that you provide copies of John Sexton's deposition (all volumes), all of John's personnel and medical records generated while he was employed at Texaco, and any and all medical records obtained and/or produced in his case. I also need copies of all request for production answers and interrogatory answers which John provided to Texaco during the course of the litigation. Should there be anything else in the file which in any way reflects John's medical condition or supported John's medical claims, I also request a copy of that material as well.

I ask that this material be copied and/or made available immediately. It would certainly expedite the situation if this material could just simply be copied and sent over; however, I am willing to come over and inspect the material and make arrangements for it to be

reproduced if this will help ensure that the records are ready as soon as possible.
Thank you for your cooperation.

Sincerely

s/ Valorie W. Davenport

Valorie W. Davenport

VALORIE W. DAVENPORT
1100 Louisiana, Suite 4450 • Houston, Texas 77002
Phone: 713-655-1500 • Facsimile: 713-655-0077

Valorie W. Davenport
Attorney at Law

June 2, 1993

Joan M Lucci Bain
Nelkin & Nelkin
5417 Chaucer
Houston, Texas 77005

Dear Ms. Bain:

As you know, 76a entitles any person access to unfiled discovery not subject to a proper sealing order. Therefore, please advise me of your preference as to the mechanics of how the requested material can be copied, and I will make the necessary arrangements immediately, at my expense, of course.

I would appreciate your full and expedited cooperation.

Very truly yours,

s/ Valorie W. Davenport
Valorie W. Davenport